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# LECTURES ON COMPANY LAW

A Practical Book For  
LAWYERS, BUSINESSMEN AND STUDENTS

WITH THE FULL TEXT OF THE INDIAN COMPANIES ACT, 1913  
AS MODIFIED UP TO DATE

AND

WITH REFERENCES TO ENGLISH AND INDIAN CASES  
AND TABLES OF DOCUMENTS TO BE FILED WITH  
THE REGISTRAR AND BOOKS AND REGISTERS  
TO BE MAINTAINED BY THE COMPANY

BY

SHANTILAL M. SHAH

OF LINCOLN'S INN, BARRISTER-AT-LAW

EIGHTH EDITION

*(Revised and Brought up to date)*



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## **PREFACE**

While the present edition was in press, the Indian Republic was inaugurated on 26th January, 1950, and the change in the Constitution of the country necessitated an order under the new Constitution so as to give effect to the continuance of all existing laws, Central and Provincial, with such modifications as would bring them into accord with the provisions of the new Constitution. Accordingly, in exercise of the powers conferred upon him by clause (2) of Article 372 of the Constitution the President of the Republic passed what is called 'Adaptation of Laws Order, 1950' and it was brought into force as from the date of the inauguration of the new Constitution, i.e 26th January, 1950. Provisions of this Order affecting the Indian Companies Act are noted in the 'Addendum' in this edition and readers will do well to bear them in mind while reading the Lectures or the Text of the Act. No other amendment is made in the Act since the publication of the previous edition except that the whole of Part X-A relating to Banking Companies has been deleted from the Act by reason of a separate Act having been enacted being Act X of 1949 entitled 'The Banking Companies Act, 1949.'

The present edition is thoroughly revised and the case-law has been brought up to the end of 1949.

Chamber 17,  
High Court Building,  
Bombay.  
1st May, 1950.

**S. M. SHAH.**



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## ADDENDUM

In consequence of the inauguration of the Republic of India on 26th January, 1950, the President of the Republic passed an order called Adaptation of Laws Order, 1950, with a view to bring the provisions of laws in force in the territory of India into accord with the provisions of the Constitution of India. The said Order has been brought into force as from 26th January, 1950, and the provisions thereof in so far as they are material to the Indian Companies Act, 1913, are noted below.

Section 3 of the said Order provides that as from the appointed day (i.e. 26th January, 1950), all existing Central laws mentioned in the Schedules to the Order shall, until repealed or altered or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules or, if it is so directed, shall stand repealed.

In pursuance of the provisions of section 4 of the said Order, wherever the words 'Governor-General,' 'His Majesty' or 'Crown' and 'Province' occur in any law, they shall be substituted by the words 'President,' 'Government' and 'State' respectively.

Under section 22 of the said Order, all powers which under any law in force in India or any part thereof were, immediately before the appointed day, vested in or exercisable by any person or authority shall continue to be so vested or exercisable until other provision is made by some Legislature or authority empowered to regulate the matter in question.

Section 27 of the said Order saves from the provisions thereof the previous operation of, or anything duly done or suffered under, any existing law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

The first Schedule annexed to the said Order provides the following amendments in the Indian Companies Act, 1913 :

Throughout the Act, after "Act of Parliament" insert "of the United Kingdom."

**Section 1.**—For sub-section (3) substitute—

"(3) It extends to the whole of India except Part B states."

**Section 2.**—After clause (16) insert—



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## **ADDENDUM**

**"(16A) 'State' means a Part A State or a Part C State, and 'States' means all the territories for the time being comprised within Part A States and Part C States: "**

**In clause (17), for "Item 33" substitute "entries 43 and 44" and for "the Government of India Act, 1935" substitute "the Constitution."**

**Section 245.—For sub-section (1) substitute—**

**"(1) Any affidavit required to be sworn under the provisions or for the purpose of this Part may be sworn in India or within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or elsewhere before an Indian Consul or Vice-Consul."**

# LECTURES ON COMPANY LAW

## LECTURE I PRELIMINARY

*What is a Company—History of Companies in England—History of Company Law in India—Distinction between Companies and other Associations—Illegal Associations—Effects of an Illegal Association—Companies under the Act—Application of the Act—Jurisdiction of Courts—Rules as to prescribed matters.*

### WHAT IS A COMPANY ?

The word 'company' ordinarily means an association of a number of individuals formed for some common purpose. It involves two ideas. firstly, the members of the association are so numerous that it cannot aptly be described as a firm or a partnership, and secondly a member may transfer his interest in the association without the consent of the other members. Such an association may be incorporated according to law whereupon it becomes a body corporate, or what is usually called a corporation with perpetual succession and a common seal. It is then regarded as a legal person, separate and distinct from its members. If, however, it is not so incorporated, it does not acquire any separate existence and, therefore, it is never regarded in law as distinct and separate from its members. Most of the present day companies are corporations under the Indian Companies' Act of 1913. Among these, by far the most important and usual form of companies is a company limited by shares.

### HISTORY OF COMPANIES IN ENGLAND

Corporations formed for the purpose of carrying on business have a long history. But it is only for the last 100 years that the Legislature in England has made it easy for groups of persons to attain corporate form, and to allow them to trade with limited liability, and it is only by reason of these two features that the company law both here and in England is regarded as one of the most important pieces of legislation to-day.

The history of companies can be resolved into well-defined and distinct periods. The earliest is one which preceded what is known as Bubble Act of 1720. The idea of employing corporate bodies for the purposes of trade was well known in the 17th century. There were great many companies carrying on trade outside the British Islands and those companies were given a number of privileges by the British Government, both governmental and trading. One of such companies was the East India Company which started business.

ness in this country as far back as 1600 A.D. In course of time, some of those companies became rulers of territories, and some of the other companies, e.g., Virginia Company, disappeared when a settled colony was formed.

These companies, during the first period of the history of companies, fell under one of the two classes: (1) Regulated, or (2) Joint Stock Companies. The difference between these was that, in the Regulated Companies, each member conducted his own trade with his own capital, subject to the rules of the company, while, in the case of Joint Stock Companies, the company traded as a single and distinct person with the capital contributed by its members. The second kind was found more convenient by the trading classes in later years, and is the origin of the modern company. By the end of the 17th century, a great many of this second class of companies came into existence, and they had shares which could be freely transferred.

In the beginning of the 18th century however it was found that these companies could be and were actually used for all sorts of speculative projects, and the existing law on the subject of companies being very scanty, abundant opportunities for speculation were afforded. Just about this time, the South Sea Company was formed and the shares of that company were heavily speculated upon. That induced the Legislature to intervene and, in 1720, it passed what is known as the Bubble Act which formed the second period in the history of English companies.

The effect of this Act was to make it very difficult for an association of persons to get incorporated. The Act made it a criminal offence to act as a corporation without the sanction of an Act of Parliament or a charter. It also made it a criminal offence to have a transferable share. The result was to retard the development of the company law, and, as a matter of fact, there was too little of company law during the 18th century. By reason of this Act, therefore, persons who wanted to associate for the purposes of business formed large unincorporated companies which were regarded by law as large partnerships. This device, however, led to a large number of legal difficulties, e.g., each partner had a full power as against the others in dealing with the assets of the concern; each was wholly liable for the debts of the concern; the death of one of the partners dissolved the association; and all members of the association were to be joined in actions by these big bodies. This state of affairs continued upto 1825, in which year the Bubble Act was eventually repealed, and, thereupon, opened a new chapter in the history of companies.

The next period ran from 1825 to 1844. The Act of 1825 which repealed the Bubble Act authorised the incorporation of companies

and provided that the members of a company shall be liable for the debts of the company to an extent the charter might provide. Another Act passed in 1834 sought to give some of the privileges of corporations to associations without actually being incorporated. These two Acts, however, were not found to work well and, therefore, a new Act was passed in 1837 which contained certain regulations as to the formation and conduct of the business of incorporated companies. This Act, though an improvement on the two previous Acts, was also found unsatisfactory because it appeared from the report of the Parliamentary Committee appointed to investigate the working of the Act that it was very easy to use the Act to create fraudulent companies, especially as the Act made no provision for taking periodical accounts of the company and provided no means for holding directors or promoters liable for fraud.

The result of the Committee's report was that two Acts were passed in the year 1844 which were the immediate precursors of the modern company law and which marked the beginning of the fourth period in the history of companies in England.

The first of these two Acts introduced quite a new principle, namely, that it did away with the necessity of applying to the Crown for incorporation, and provided that on compliance with certain regulations contained in the Act the company would be automatically incorporated. This is one of the main principles recognized by the modern company law. The second Act of 1844 dealt with the winding up of companies, and provided a remedy for certain abuses by directors and promoters in regard to their formation and management. The main idea of this Act was to provide that companies may be made bankrupt like individuals.

But these two Acts also were not found to be working in a satisfactory manner. That brings us to the Act of 1855, which forms the last period in the history of companies. This Act introduced the second principle recognized by the modern company law, namely, the principle of limited liability. It provided that a shareholder's liability was to be limited only to the extent of the value of his share.

This Act was replaced by a more comprehensive Act passed in 1856, which introduced the modern mode of creating companies by means of a memorandum and articles of association. This Act again was superseded by the Act of 1862. Palmer calls this latter Act a masterpiece of legislation. It aimed at making the formation of a company easy, giving the members freedom to work it, and ensuring that persons dealing with the company should know that its liability is limited. This Act and eighteen other amending Acts passed at different times were later consolidated in the year 1908.



and the Companies' (Consolidation) Act was passed. This last Act now stands repealed by the recent Act of 1929.

The present English Act of 1929 is mainly a consolidating Act. The law as laid down in the Act of 1862 and the eighteen amending Acts was very little changed in the Act of 1908, which merely incorporated these previous Acts, and not the decisions on these Acts. The present Act of 1929 also incorporates only the Act of 1908 and other amendments which were passed between the years 1908 and 1929. Therefore, the decisions on those previous Acts can still be looked at in order to interpret the provisions of the present Act.

### HISTORY OF COMPANY LAW IN INDIA

Prior to the enactment of 1913 which is now extensively amended, there were several Acts passed from 1850 onward. The first Act passed in 1850 was known as Joint Stock Companies' Act. Then followed the two Acts of 1857 and 1860 respectively. But the Companies' Act of 1860 repealed all the previous Acts and this Act itself was repealed in turn by the Act of 1882. This last Act remained in force upto 1913, but in the meantime it was amended several times to meet the demands of the commercial world. The Act of 1913 was passed with the object of consolidating and amending the law relating to trading companies and other associations in British India, and was mainly based upon the English Companies' Act of 1908 with certain additional provisions to meet the peculiar business conditions obtaining in this country. And since the Indian Act closely resembled the English company law, the decisions of the English Courts under the latter were also closely followed by the Courts in India. This Act of 1913, however, did not provide for certain peculiarities of the Indian commerce such as managing agency and was found to be highly unsatisfactory in several other respects in the course of its operation. Eventually, extensive amendments were introduced in the Act by Act XXII of 1936 which came into operation on 15th January, 1937, and now we find that the Indian company law has gone far in advance of the English company law in certain respects. The vast number of amendments introduced by the Amendment Act, however, have naturally involved a few slips here and there but they are being gradually remedied by amending the Act almost every year.

### DISTINCTION BETWEEN COMPANIES AND OTHER ASSOCIATIONS

A company under the Indian Companies' Act, 1913, is defined in cl. (2) of sub-section (1) of s. 2 of the Act and means a company formed and registered under the Act or an existing company. An existing company again is defined in cl. (7) of the same sub-section and means a company formed and registered under the Indian Com-

panies' Act, 1886, or under any Act or Acts repealed thereby, or under the Indian Companies' Act, 1882. Such a company is also called the incorporated company. Accordingly, it will be seen that a company under the Act really means an association of the type described in the beginning of this lecture formed and registered under the Act of 1913, or any of the earlier Acts.

Such a company, however, is not the only kind of association known to law. There are several others, the principal of which are: (i) ordinary partnerships, (ii) companies incorporated by Royal Charter; (iii) companies incorporated by special Acts of the Legislature; (iv) unincorporated companies, and (v) insurance companies and co-operative societies.

It would be advisable at this stage to say a few words on each of these associations by way of comparison and contrast with the companies under the Act in order to bring the special characteristics of the latter in clear relief.

#### (i) A Partnership

Taking the case of a partnership first, it may be distinguished from a company in the following particulars:—

(1) A company is a distinct person; but a firm is not distinct from the several persons who compose it. *Salomon v. Salomon & Co. Ltd.*, (1897) A. C. 22, *F. B. M. Co. Ltd. v. Dominion Bank*, A. I. R. 1937 P. C. 279.

(2) In a partnership, the property of the firm is the property of the individuals composing it. In a company, it belongs to the company and not to the individuals composing it. *In re George Newnan Co.*, (1895) 1 Ch. 685.

(3) Creditors of a partnership are creditors of individual partners. If they get a decree against the firm, it can be executed against the partners jointly and severally. In the case of a company, however, creditors can proceed against the company alone, and members of the company are not directly liable to them. *Harihar Prasad v. Bansi Misir*, A. I. R. (1931) Pat. 321 (F.B.)

(4) A partner can dispose of the property and incur liabilities so long as he acts in the course of the firm's business, because each partner is the agent of every other partner in all matters connected with the partnership business. A member of a company has no such power. *Baird's case*, 5 Ch. App. 725.

(5) In a partnership, restrictions on the powers of a particular partner contained in the agreement of partnership will not avail against outsiders, but those in the articles of association of a company are effective as against the public because they are a public document and one can find out what is in them.

(6) A partner cannot contract with his firm, whereas a member of a company can

(7) A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's shares are freely transferable

(8) A partner's liability is always unlimited, whereas that of a shareholder may be limited either by shares or a guarantee

### (ii) A Chartered Company

A company incorporated by a Royal Charter has an unrestricted corporate capacity as an ordinary person though there may be a direction in the creating charter in limitation of the corporate powers. Such direction however, though it may give the Crown a right to annul the charter, cannot derogate from the plenary capacity with which the Common law endows the company in spite of the limitation being an essential part of the so called bargain between the Crown and the corporation. This feature of a chartered company is in marked contrast to the strict delimitation by the Legislature and the Courts of the registered company to its defined objects. **Balkat Ali v Official Liquidator**, AIR (1943) Mad 111. Instances of such chartered companies are The East India Company incorporated under the charter of Queen Elizabeth on the 31st of December 1600. The Bank of England incorporated in 1674. Peninsular and Oriental Steam Navigation Company incorporated in 1840.

### (iii) A Company incorporate by a special Act of the Legislature

Companies in relation to railway dock gas electric and tram way undertakings are usually incorporated by special Acts of Legislature. They are mostly invested with compulsory powers whereas in a company under the Act the directors have always got discretion in regard to the use of the powers conferred on them by the memorandum and articles of the company. Except for this main point of distinction both kinds of companies are closely analogous to each other in the matter of their constitution.

### (iv) An Unincorporated Company

Unincorporated companies are constituted by contract and they have always been regarded as large partnerships with these special features (a) the transferability of shares, (b) continuity of the concern notwithstanding the death or bankruptcy of members, and (c) the vesting of the management in a select body of directors to the exclusion of the members. In these three features they resemble a registered company. But as regards the liability of their members, they are always held liable to the full extent of their means as in the case of ordinary partnerships.

### (v) Insurance Companies and Co-operative Societies

These associations are governed by their own Acts. Truly speaking, they are not companies but resemble them only in that the liability of their members is limited.

### ILLEGAL ASSOCIATIONS

Now, having discussed the chief characteristics of a company formed under the Act, a question may be asked as to whether it is absolutely discretionary with an association of any number of persons formed for the purpose of carrying on a business for gain either to get itself registered under the Companies' Act or to act as a partnership or an unincorporated company. The answer to this question is provided by s. 4 of the Indian Companies Act, 1913, which points out that no such discretion can be allowed except in cases of certain associations. If it were otherwise, the whole of the Act would be a needless affair. That section says:—

"(1) No company, association or partnership consisting of more than 10 persons shall be formed for the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law, or of Royal Charter or Letters Patent. (2) No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law, or of Royal Charter or Letters Patent."

Accordingly, it will be noticed that, where an association is formed for the purpose of carrying on business of banking, and the number of individuals forming such association exceeds ten, it must of necessity be registered under the Companies' Act. Similarly, if the association is formed for the purpose of carrying on any other business for gain and consists of more than twenty persons, it must be compulsorily registered under the Act. If not, the association will be regarded as an illegal association in law although none of the objects for which it may have been formed is illegal within the meaning of s. 23 of the Indian Contract Act, 1872.

Another effect of the section is that, in so far as associations formed for doing banking business consist of ten or less than ten persons and those formed for doing any other kind of business for gain consist of twenty or less than twenty persons, they need not be registered under the Act. If desired otherwise, there is nothing to prevent them from being registered under the Act and acquiring a corporated form with all the powers and privileges conferred upon the registered companies by the Act provided that, in case of associations formed into public companies, the number of persons is

not less than seven and, in case of those formed into private companies, such number is not less than two (s. 5). The question is entirely one of option with such associations whether to get themselves registered or not. If not registered, they will none the less be regarded as perfectly legal associations but the liability of their members will be always unlimited whether such associations do the business as simple partnerships or unincorporated companies.

It will be obvious that the section is prohibitive and its provisions are imperative. In this country, it was first enacted in the Act XIX of 1857 so far as any business for gain other than that of banking was concerned. In England, a similar provision was for the first time made in the Act of 1862. The object of this prohibitory provision has been thus stated in *Smith v. Anderson*, 15 Ch D. 273:

"The Act (of 1862) was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting and so might be put to great expense which was a public mischief to be repressed."

It will, therefore, be seen that the provision was enacted solely for the purpose of protecting the public against all sorts of deceptions that may be practised upon them by associations formed without any legal check.

Now, it is necessary to go deeper into the details of s. 4 and properly analyse and appreciate the implications of the different technical terms employed in it.

#### What is a Company?

The first technical term used in that section is the word 'company'. The word only means a company in its ordinary sense which has been explained at the very outset of this lecture

#### What is an Association?

The second term is 'association'. It might seem at first sight that this word must necessarily have a different meaning from the other two, namely, company and partnership, between which it has been placed, and it has, in fact, been attempted to be defined in several decided cases. In *Smith v. Anderson* (*supra*), Lord Justice Cotton says (p. 282):

"If 'association' is intended to denote something different from a company or partnership, it must be judged by its two companions between which it stands, and it must denote something where the associates are in the nature of partners. It seems to me that it might have been intended to hit the case, which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it."

The distinction here pointed out is very fine. His Lordship, however, in a later paragraph states:

“‘Company’ and ‘association’ as distinguished from ‘partnership’ probably imply a combination in which the partners can change without consent as between the partners or novation as regards the creditors.”

Lorn Justice James, on the other hand, in that case does not attach any significance to the term and says that ‘company’ and ‘association’ are both synonymous terms.

### What is a ‘Person’?

Then we go to the next term ‘persons’. ‘Person’ is not defined in the Act. It must, therefore, be explained with reference to its definition in the General Clauses Act X of 1897. There ‘person’ includes any company or association or a body of individuals, whether incorporated or not. It can, therefore, be used to include a number of persons such as a joint Hindu family or a varying number of beneficiaries who may from time to time become interested in the trust property. *Moti Ram v. Abdul Jalil*, 46 All. 509 followed in *Mewa Ram v. Ram Gopal*, 48 All. 395. The principle applicable in these cases is that the ‘person’ must hold an independent position in law. If so, it will count as one person in the constitution of a company even though it may be a company or an association or a body of individuals, whether incorporated or not. Accordingly, a joint Hindu family as represented by its managing member counts as one ‘person’ as it is regarded in Hindu Law as a distinct entity by itself irrespective of the varying number of individual coparceners composing it. This is now specially recognised by cl. (3) of s. 4 which is added by the Amendment Act, 1936. The clause provides that the section shall not apply to a joint family carrying on joint family business. But, curiously enough, it further says that, where two or more joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded. The effect of this provision is that, in such cases, a joint family shall not count as one person but as many persons as there are adult members in each of the joint families. Consequently, the effect of the above decisions in this connection is partially affected.

Similarly, a person who holds shares both in his own name and on behalf of a minor also counts as one ‘person’. So also a company registered under the Act, if authorized by its memorandum to take shares of some other company, would count as only one ‘person’, such company being recognized as a separate entity in law. But a firm or partnership is not a body which is recognised as an independent body in law and, therefore, where a company consists of a firm, for the purposes of s. 4, members of the firm will count as members of the company in their own capacity. *Senaji v. Pannaji*, 32 Bom. L.R. 1607 (P.C.). In this case, the plaintiffs were three firms, one consisting of four and each of the other two consisting of five

partners. They alleged that they and the defendants, another firm consisting of eight partners, had entered into a partnership agreement regarding the sale of a certain number of bales of yarn. They further alleged that the said partnership was dissolved by efflux of time and prayed that it may be wound up and accounts thereof be taken. The point as to the illegality of the new partnership was not taken in the first Court and a decree was passed for dissolution and accounts. In appeal, however, the High Court of its own motion raised the point of illegality and dismissed the plaintiffs' suit. On appeal to the Privy Council, their Lordships held that the suit was properly dismissed as it referred to an association of more than twenty persons which, being unregistered under the Indian Companies' Act, was illegal. It was also held that the point of illegality was rightly taken in appeal as it was patent on the face of the plaint. But where the illegality is not so patent, and also the plaintiff is estopped from raising the contention as to the illegality by reason of his consent to refer the matters in dispute to arbitration and not to raise that question and also to treat it as *res judicata*, he cannot succeed in his suit to set aside the award and the proceedings before the arbitrators on the ground that they were initially bad. the syndicate itself being an illegal body. *Raoji v. Ratansi*, 32 Bom. L. R. 382. A sub-partner in a firm, however, is not a member of the firm, and, therefore, the existence of a sub-partner does not affect the number of members of a firm for the purposes of s. 4. *Chandulal v. Keshavlal*, 38 Bom. L. R. 486.

### Carrying on Business

This phrase as used in s. 4 has been explained by the Privy Council in *Goswami Shri 108 Shri Girdhariji Maharaj v. Shri Govindlalji Maharaj*, 18 Bom. 294.

"This phrase is an elastic one and is almost incapable of definition. The tribunal must in each case look to the particular circumstances. It appears to their Lordships that the Letters Patent (of the Bombay High Court) intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who have business transactions with him."

And the term 'business' has been defined by Jessel, M. R., in *Smith v. Anderson*, 15 Ch. D. 247 as meaning anything which occupies the time and attention and labour of a man for the purpose of profit. It has a more extensive significance than trade. *Commissioners of Inland Revenue v. Korean Syndicate*, (1920) 1 K. B. 598, 603 on appeal (1921) 3 K. B. 258. For instance, farming and banking are both businesses, though neither of them is a trade. *Harris v. Amery*, L. R. I. C. P. 148. In order to come within the purview of s. 4, the association must be formed for the purposes of carrying on business. If it is not so formed but, as a result of the combination

or agreement between the members, there is gain either to the association or to its members, then the association though consisting of more than 20 members does not fall within the purview of s. 4 and does not require to be registered. *New Moffusil Co. Ltd. v. Rustomji*, 38 Bom. L. R. 408. In this case, more than 20 persons carrying on a similar trade entered into a pooling agreement under which they agreed to pay a certain proportion of their individual earnings to one of them as a custodian of the pool who, after making necessary disbursements, was to distribute the balance among such persons. The question arose whether the association formed of such persons fell within the purview of s. 4 or not. *Rangnekar J.* held that it did not, as each one of the members remained entitled to carry on his business in an unrestricted manner, and as the members of the pool only agreed that each one of them should contribute his earnings to the common pool for the purpose of stifling unhealthy competition and distribute the same in certain shares amongst them. His Lordship observed that such an association was undoubtedly a trade association formed with the ultimate object of gain to its members but it was not an association formed for the purpose of carrying on any business. The test of business, according to His Lordship, is continuity and repetition of acts; but nature of the acts, and the act itself, if done singly, must be such as can be called business.

### Gain

The next important term in the section is 'gain'. It really means acquisition. It is not confined to pecuniary gain, still less to a commercial profit. *Tan Waing v. Bo Hein*, 10 Rang. 490. For instance, securing indemnity against loss in carrying on a trade is gain. The meaning of the term can be well found by contrasting an association whose objects are charitable. *Arthur Average Association*, in re., 10 Ch. 545. A combination of persons for forming a common fund for investment by trustees in certain securities is not an association for gain. Persons who have no mutual rights and obligations do not constitute an association just because they happen to have a common interest or several interests in something which is to be divided between them. *Smith's case (supra)*. S. 4, therefore, does not apply to literary, scientific or charitable associations nor to an association whose members subscribe to a fund for providing pensions for their dependants. *Kraal v. Whimper*, 17 Cal. 786. But it applies to Loan and Mutual Benefit societies. *Re Thomas*, 14 Q. B. D. 379; *Greenberg v. Cooperstein*, (1926) 1 Ch. 657.

### EFFECTS OF AN ILLEGAL ASSOCIATION

An association which, being compulsorily registrable, is not registered has no legal existence under the Act nor can it be regarded as a partnership. Consequently, such an association, (i) cannot



enter into any contract, *Jennings v. Hammond*, 9 Q. B. D. 225; (ii) cannot sue any member or any outsider if the illegality becomes apparent [*Ex parte Day*, 1 Ch. D. 199; *Nibaran Chandra Shaha v. Lalit Mohan Shaha*, (1928) 2 Cal. 368], not even if the company is subsequently registered, *The Gujarat Trading Co. Ltd. v. Tricumji*, 3 Bom. H. C. R. (O. C.) 45; *Ramaswami v. Narendrayyan*, 19 Mad. 31; (iii) cannot be sued by a member or an outsider for it cannot contract any debts, *Manekji v. G. N. Cama*, 3 Bom. H. C. 159 (O.C.); (iv) cannot be wound up under the Act either at the instance of a creditor, a member or the association itself, *Ilfracombe Permanent Mutual Benefit Society*, (1901) 1 Ch. 102. It has been, however, held that the Court may under its general jurisdiction to administer trusts, without reference to this Act, wind up an unregistered society and make the manager account and distribute the assets. *Customs and Excise, etc., Fund*, (1917) 2 Ch. 18; *Greenberg v. Cooperstein*, (1926) 1 Ch. 657.

In *Greenberg's* case, an association with four branches was formed to obtain subscriptions from the members of each branch and to lend to members out of the fund so formed money on interest. This association and its branches all consisted of more than 20 members and yet it was not registered under any statute. Disputes having arisen, an action was brought by three of the members on behalf of all members other than the defendants against the treasurer and the secretary of the association, claiming administration of the assets of the association, an account of the subscriptions received, payment of the amount found due and other reliefs. The action was resisted on the ground that the association was illegal and that no relief could therefore be given. It was held that, notwithstanding the illegality of the company, the Court was not debarred from affording relief to the members asking for the return of the money paid into the hands of the agents for application for an illegal purpose by granting an account before the money so paid had been applied to the illegal purpose. Lord Tomlin in course of his judgment observed that the case was different from those where an illegal association was seeking to recover money lent by it which in law it could not do as it could not enter into a valid contract and enforce the same.

*Greenberg's* case was referred to in a recent Allahabad case where it was held that no suit would lie for the partition of the assets of an illegal association and it was distinguished on the ground that the money raised by subscription there had not been applied for the illegal purpose. *Madan Lal v. Janki Prasad*, 49 All. 319, following *Mewa Ram v. Ram Gopal*, 48 All. 735.

In *Mewa Ram's* case, it was held that where an association is illegal under s. 4 of the Act and the business of the association has

been going on for some years, none of its members can sue for partition of the existing assets of such association as it would be in substance and in fact an order to wind up the association, realize its assets, discharge the liabilities and distribute the balance, and whether you call the gentleman charged with carrying out that duty a receiver or an amin or a commissioner, he would be in substance a liquidator and a liquidation is clearly prohibited by the language of s 4 of the Act which treats an association such as this as one not recognised by law.

In a Rangoon case, however, such a suit was held to be maintainable on the ground that what was asked for was not an enforcement of an illegal contract nor was the suit based upon such a contract, and that, if the prayer in the plaint be given effect to, the result would be that an illegal association is brought to an end. It was also held that the illegality of an unregistered association cannot be cured by a subsequent reduction in the number of its members. *U Sin Po v U. Phyu*, 7 Rang 540. Such illegality can neither be cured on the ground that the association originally consisted of less than ten people in the case of banking business and twenty in the case of other businesses, and subsequently grew to more than the maximum allowed under s 4. *In re Thomas, Ex parte Poppleton*, 14 Q B D 379, 382, *Nibaran Chandra Shaha v. Lalit Mohan Shaha*, (1938) 2 Cal 368.

In any event, it does not seem open to doubt that members of an illegal association have a beneficial interest in the property belonging to such association. *Queen v Tankard*, (1894) 1 Q B. 548; *Nibaran Chandra Shaha v Lalit Mohan Shaha*, (supra).

The point that an illegal association cannot be sued on contracts made by it requires some further consideration. In *Appa v. Ramakrishna*, 31 Bom L R 1187, the plaintiff sued the defendants who were three of the members of the illegal association to recover a certain sum of money found due at the foot of an account in respect of certain transactions of sales and purchases. The defence was that the association with which the transactions were carried on consisted of far more than 25 persons and, therefore, it being an illegal association, neither the association nor the defendants who were its members were liable. It was, however, held that the plaintiff who was a bona fide third party could not be defeated by an illegality in the constitution of the defendants' association of which he was not aware. The Court relied for its decision upon a passage in Lindley's *Partnership*, 9th edition at p. 140, which is in these terms:

"The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person, who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not per se afford any answer to a demand against it, arising out

of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he, not being implicated in any illegal act in himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership."

Reliance was also placed upon three English cases which were decided on the same principle. *In re South Wales Atlantic Steaming Co.*, (1876) 2 Ch. 763; *Doolan v. Midland Rly. Co.*, 2 A. C. 792; *West London Commercial Bank v. Kitson*, 13 Q. B. D. 360.

It would be, therefore, obvious that if the plaintiff knew of the illegal character of the association, his suit would not be competent. *Madan Gopal v. Shewal Dass*, A.I.R. (1934) Lah. 882.

#### Effect of recent amendment

This was the law prior to the recent amendment of the Act in 1936. But now, under s. 4 (4) of the Act, every person who is or continues to be member of a company, association of partnership carrying on business in contravention of s. 4 shall be personally liable for all liabilities incurred in such business, and every such member shall, in addition, be punishable, under sub-sec. (5), with fine not exceeding one thousand rupees. *Ma. Si Muthuviran Chettiar v. Mottayan Chettiar*, A.I.R. (1942) Mad 283.

It would, therefore, seem that, under the amendment, a suit would lie against every member of an illegal association and not the association as such for enforcing all liabilities incurred in the business of such association, irrespective of whether the plaintiff had or had no notice of the illegality of the association. These two new sub-sections have only a prospective operation and, therefore, the old law as embodied in the foregoing cases would still prevail where the transaction in question has been effected prior to the amendment.

#### 'Illegal' how interpreted

The question whether an association which is unregistered and falls within s. 4 of the Act could be strictly called illegal was considered in an Allahabad case where it was observed that such an association can have no legal recognition as a juristic unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such, but that while taking stock of its disabilities it could not be said that a trade association is unlawful merely because it has not been registered under the provisions of the Companies' Act. *Bholanath v. Lachmi Narayan*, 53 All. 316.

#### COMPANIES UNDER THE ACT

Among the companies under the Indian Act of 1913 are: (1) unlimited companies where the liability of members is not limited at all; (2) companies limited by shares which are by far the most numerous at the present time; and (3) companies limited by

guarantee where each member undertakes to be liable to pay the debts of the company upto a certain amount, but the capital of the company is not usually divided into shares.

There are again two varieties of each of the kinds of companies described. A company may be either private or public. We shall deal with the distinction between a private and a public company at a later stage.

The Amendment Act, 1936, brings under the purview of the Act another variety of companies called subsidiary companies which mean companies which satisfy the conditions specified in s. 2 (2) and include subsidiary companies of such companies. We shall consider these conditions and the nature of these companies also at a later stage.

#### APPLICATION OF THE ACT

The Indian Companies' Act with all its amendments upto date applies to the following companies.—

- (1) Companies formed or registered under the Act;
- (2) Every existing company;
- (3) Every company registered but not formed under Act IX of 1957 and Act VII of 1860 or either of them or under the Act of 1866 or 1882. S. 251 applies the Act to the companies under this clause to the extent mentioned in s. 266;
- (4) Companies registered under the Act pursuant to the provisions contained in part VIII of the Act to the extent specified in s. 266;
- (5) Unregistered companies for the purpose of winding up under part IX of the Act. S. 270 defines an unregistered company for purposes of this part and s. 276 prescribes the extent of its application cumulatively with other provisions of the Act regarding winding up of companies formed and registered under the Act; and
- (6) Foreign companies which comply with the provisions of s. 277 of the Act.

On the other hand, the Act does not apply to:—

- (1) Companies established by Royal Charter or Letters Patent or by an Act of Parliament or by some other Indian law;
- (2) The Imperial Bank of India to which the undertakings of the Banks of Bengal, Madras and Bombay have been transferred by Imperial Bank of India Act No. 47 of 1920 save as provided in ss. 188 and 189 (s. 289).
- (3) Companies governed by the Indian Life Assurance Companies' Act, 1912, or by the Provident Insurance Societies' Act, 1912 (s. 247);

- (4) Companies of which winding up has commenced before the commencement of the Act in so far as provisions of the Act as to the winding up of companies are concerned (s. 284); and

(5) Societies registered or deemed to be registered under the Co-operative Societies' Act of 1912 (s. 48 of that Act).

## JURISDICTION OF COURTS

S. 3 of the Act, in the first instance, confers jurisdiction to deal with matters arising under the Act on the High Court within whose jurisdiction the registered office of the company is situate. The Central Government may, however, by notification in the official Gazette empower any District Court to exercise the same jurisdiction as the High Court in respect of companies having their registered offices within the jurisdiction of that Court.

So far as the winding up of a company under the Act is concerned, the expression 'registered office of the company' means the place which has longest been the registered office of the company during the six months prior to the presentation of the petition for winding up. This clause will apply only where a company has been shifting its registered office from district to district or even from province to province. But no proceedings taken in a wrong Court shall for that reason be deemed to be invalid under this section.

In view of the nature of the jurisdiction conferred by this section, it has been doubted in a recent case whether an application to rectify the register kept by the Registrar of Companies, for which no provision is made in the Act, can properly be brought before the Judge dealing with company matters. *Arya Insurance Co. Ltd. In re*, 63 Cal. 773. But suits in respect of disputes between the board of directors and the managing agents regarding the powers of the latter are cognizable not by the District Court under this section but by the ordinary civil Courts. *Nawabshah Electric Supply Co. Ltd. v Hariram*, A. I. R. (1947) Sind 31.

## RULES AS TO PRESCRIBED MATTERS

S. 151 of the Act vests powers in the Central Government in place of the Governor-General-in-Council since the passing of the Government of India (Adaption of Indian Laws) Order, 1937, to make rules providing for all or any of the matters which by the Act are required to be prescribed by its authority, and to alter any of the tables and forms in the First Schedule, and also to alter or add to the forms in the Third Schedule. These powers as well as other powers that are conferred by this Act upon the Central Government are in turn made the powers of the Provincial Government by s. 289A inserted in the Act by the Order in Council referred to above in relation to companies with objects confined to a single province which are not trading corporations.

## LECTURE II

### MEMORANDUM OF ASSOCIATION

*Steps for forming a Company—What is a Memorandum of Association—Memorandum in relation to Articles—Preparation of Memorandum—Name of the Company—Place of Registered Office—Objects of the Company—Clause limiting Company's Liability—Capital Clause—Association Clause and Subscription—Alterations in Memorandum.*

#### STEPS FOR FORMING A COMPANY

Usual steps in the formation of a company are:—

1. Preparation of Memorandum of Association;
2. Preparation of Articles of Association;
3. Preliminary contracts, if any;
4. Registration of the company; and
5. Issue of a prospectus or a statement in lieu of a prospectus.

#### WHAT IS A MEMORANDUM OF ASSOCIATION?

In order to form a company, the first step is to prepare the memorandum of association. Sections 5 to 16 of the Act prescribe the particulars to be mentioned in a memorandum of association and other requirements.

S. 2 (10) defines a memorandum to mean the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of the Act. The definition, however, neither gives us any idea as to what a memorandum of association really is nor does it point out the role which it plays in the affairs of a company. We must, therefore, turn to judicial pronouncements for that purpose, if any, before we proceed to consider the provisions of the Act bearing on its different aspects.

A memorandum of association is a document which sets out the constitution of a company and, as such, it is really the foundation on which the structure of the company is based. It defines its relations with the outside world and the scope of its activities. Its purpose is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise. *Egyptian Salt and Soda Co. Ltd. v. Port Said Salt Association Ltd.* (1931) A. C. 677. The importance of this document is so great that in England, until the year 1890, it was regarded as an unalterable charter of a company. That, however, led to a number of hardships in the actual working of companies. Accordingly, provisions were made for altering the memorandum in certain cases and to a certain extent in s. 19 of the English Companies' Act of 1890. Except for this, the memorandum is still regarded as an unalterable charter

because, being the very basis of the company, it is thought that it should not be allowed to be altered every now and then in the interests of the creditors, the outside public and the shareholders of the company themselves. S. 10 of the Indian Companies' Act also recognises this unalterable character of a memorandum of association and expressly lays down that a company shall not alter the conditions mentioned in its memorandum except in the cases and in the manner and to the extent provided for in the Act. These provisions are to be found in ss. 11 to 16. There is, however, a proviso added to the section by the Amendment Act, 1936, which says that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company shall not be deemed to be such a condition. Consequently, such a provision can be altered as freely as the articles without having to comply with the strict requirements for an alteration of any of the conditions mentioned in the memorandum. *Ramchandra v. Chinubhai*, A. I. R. (1944) Bom. 76.

#### MEMORANDUM IN RELATION TO ARTICLES

The importance of a memorandum of association can be better appreciated by comparing it with the articles of association. The latter are a bundle of rules made by the company for the internal management of its affairs and for carrying out the objects of the company as set out in the memorandum. The distinction between these two documents has been well pointed out by Lord Cairns in *Ashbury Railway Carriage Co. v. Riche*, (1878) 7 H. L. 653 in these words:

"The memorandum is, as it were, the area beyond which the action of the company cannot go; inside the area the shareholders may make such regulations for their own government as they think fit."

Hence it is that the law does not allow the memorandum to be altered except in the manner and to the extent provided by the Act, whereas the articles, being only the bye-laws of the company, can be altered by special resolutions to any extent. Another result of this distinction is that the articles are subordinate to the memorandum. They cannot alter or control the memorandum. Yet it is well established that the memorandum should be read in conjunction with the articles in so far as it may be necessary to explain any ambiguity appearing in the terms of the memorandum or to supplement it upon any matter about which it is silent except in respect of matters as must by statute be provided for by the memorandum. *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349, 381; *Angostura Bitters, Ltd. v. Kerr*, (1933) A. C. 550; *Syamchand v. Calcutta Stock Exchange Association*, A. I. R. (1949) Cal. 337.

## PREPARATION OF MEMORANDUM

As has been already stated in the preceding lecture, the least number of persons required for forming an incorporated public company under the Act is seven, and two if the company is to be a private one (s. 5). These persons may, by subscribing their names to the memorandum and otherwise complying with the requirements of the Act as to registration, form an incorporated company with or without limited liability.

In the case of a company limited by shares, the memorandum must state (s. 6):—

- (1) the name of the company with 'Limited' as the last word;
- (2) the place of its registered office;
- (3) the objects of the company and, except in the case of trading corporations, the territories to which they extend;
- (4) the fact that the liability of its members is limited;
- (5) the amount of capital and the division thereof into shares of a fixed amount;
- (6) the association clause and subscription.

In the case of a company limited by guarantee, the facts stated in clauses (1) to (4) and (6) must be set out in the memorandum with this further fact that each member undertakes to contribute a certain amount to the assets of the company for payment of the debts of the company and of costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves if the company is wound up while he is a member, or within a year after he ceases to be a member. If such a company has also a share capital, the facts stated in clause (5) should be mentioned in addition (s. 7).

In the case of an unlimited company, clauses (4) and (5) out of the above-mentioned clauses have to be omitted (s. 8).

In setting out these particulars, the memorandum must be divided into paragraphs numbered consecutively and, before presenting it to the Registrar, it must be printed [s. 9 (a) & (b)].

Let us now consider the significance of each of these clauses which form the conditions of the constitution of a company.

### 1) NAME OF THE COMPANY (S. 11)

A company can adopt any name it pleases. But according to the newly substituted sub-section (3) of s. 11 of the Act, the words 'Royal,' 'Imperial,' 'State,' 'Reserve Bank' and other similar words expressing or implying the patronage of the Crown or of any member of the Royal family, or any connection with His Majesty's Government, or the words 'municipal,' 'chartered,' and such other words calculated to suggest connection with any local authority or



any society or body incorporated by Royal Charter cannot be used except with the sanction of the Central Government.

Again, the name must not resemble too closely the name of any other company unless such company is in the course of being dissolved and signifies its consent in such manner as the Registrar requires. If, through inadvertence or otherwise, a company is registered by a name identical with or too closely resembling the name of another registered company without such consent, the former may change its name with the consent of the Registrar. If the name is not so changed, the latter company may apply to the Court to have the name removed from the register of companies *Ewing v. Buttercup Margarine Co.*, (1917) 2 Ch. 1. Such relief is usually allowed if the name is used fraudulently. In *Societe Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.*, (1901) 2 Ch 513, it was ordered that the name may be changed with the consent of the Board of Trade or the company may be wound up. The principle on which the Court interferes in such cases is that no person is to be permitted to represent himself as carrying on a business which is carried on by another *Lee v. Haley*, L. R. 5 Ch. App 155.

Further, the last word of the name must be 'limited'. The reason of this provision is to ensure that all persons dealing with the company shall have clear notice that the liability of the members of the company is limited. If the company makes a contract without the use of the word 'limited,' the effect may be most serious for the officers of the company, because, in that event, the contract would be binding personally upon those who purported to act on behalf of the company *Atkins & Co., Ltd. v. Wardle*, 58 L. J. (Q. B.) 377.

But companies formed to promote art, science, etc which do not propose to pay dividends but intend to apply all gains towards the working of the company are exempted from this provision and may be registered without the word 'limited' under a licence granted by the Central Government (s 26).

Promoters of a company may choose a name in accordance with these principles. Once the name is chosen and the company is registered in that name the Act requires that it must appear on every office or place of business of the company in a conspicuous manner and on all cheques, bills, notices, advertisements, etc., of the company (s 73). The requirements of this section will be satisfied if a company affixes a board of the necessary conspicuousness and legibility outside the office room though it be inside the building. *Emp. v. Batliwala Sons & Co., Ltd.*, 43 Bom. L. R. 105.

Provision is made in s. 11 of the Act for changing the name of a company at any time in the course of its business. The only forma-

lities required are a special resolution and approval of the Central Government in writing. Then the new name is to be notified to the Registrar who enters it in his register and issues a certificate of incorporation to meet the circumstances of the case. It must be noted, however, that a change of name so effected can never affect any rights or obligations of the company nor render any legal proceeding by or against the company defective in any way.

## (2) PLACE OF REGISTERED OFFICE

The memorandum must next state the name of the place where the business of the company is proposed to be carried on. This fixes the domicile and nationality of the company. In England, this cannot be changed without the consent of the Parliament, although the situation of the office, not being an essential condition of the constitution of the company, may be changed from one part of England to another by giving notice to the Registrar. In India, the situation can be changed from one part of the country to another by passing a special resolution to that effect and on the Court confirming the alteration on petition, though the office of the company may be shifted from one town to another within the same province by a resolution and notice to the Registrar. *Aryya Insurance Co. Ltd., In re*, 63 Cal 773. The Act provides that the company must have a registered office, and that the place must be notified to the Registrar (s. 72). Reason for this provision is that it shows where the records of the company are kept and where writs and notices may be served on the company. But if there is no registered office, an order for substituted service may be made, or the writ may be served on the secretary and directors at an office which is not registered. *Re Fortune Copper Mining Co.*, 10 Eq 390.

## (3) OBJECTS OF THE COMPANY

The statement of objects in a memorandum defines the sphere of the company's activities. It has a two-fold effect: (i) affirmative, i.e., it determines what are to be the powers of the company, and (ii) negative, i.e., it restricts the powers to those actually conferred by it. Those who frame a memorandum can give to the company any powers they please with the only restriction that none of those powers should infringe or be contrary to the general law or to the provisions of the Act. A clause in the memorandum which authorizes a company to buy its own shares is contrary to the Act and, therefore, void, the reason being that to allow a company to buy its own shares would be to allow it to diminish the share capital which creditors of the company can look to for payment of their claims. *Trevor v. Whitworth*, 12 A. C. 409. Similarly, it is not a legal object to establish and work lotteries in India and, therefore, if such

a power be given to a company in its memorandum, it is utterly void.

The company, on the other hand, cannot do anything outside the powers specified in the object clause of its memorandum. Any attempt in that direction would be *ultra vires* the company, that is, the company cannot ratify such acts even if it wants to do it. The principle of law on this subject has been aptly explained by Cairns, L. C. in the well-known case of *Ashbury Railway Carriage and Iron Co., v. Riche*, L. R. 7 H. L. 653 at p. 670:

"... If that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

The principle was later recognized in another case with the remarks that it was one to be reasonably understood and applied, and that whatever may fairly be regarded as incidental to or consequential upon those things which were specified in the memorandum as objects ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*. *Att-Gen. v. G. E. Rail Co.*, 5 A. C. 473. Thus, where a company, bound to supply boats for a ferry, employed the boats, when not wanted for the ferry, in excursions, it was held to be *intra vires*. *Forest v. Manchester, etc. Rail Co.*, 30 Beav. 40. On the other hand, it is *ultra vires* for a corporation like the London County Council to run omnibuses. *L. C. C. v. Att.-Gen.*, (1902) A. C. 165.

These two cases constitute the law upon the subject and, as Lord Halsbury, L. C. observed in *London City Council v. Att.-Gen.*, (*supra*), it is impossible to go behind these two cases; they are now part of the law of the country and one must acquiesce in them, whether one likes them or not.

It will, therefore, be noticed that an act of the company against the principle above enunciated is *ultra vires* and cannot be ratified by the company. This position stands in striking contrast with a case where an act is done by the directors beyond their powers as conferred by the articles; for such an act can be ratified by the company and subsequently binds the company. Sections 196 to 200 of the Indian Contract Act, 1872, state the law of ratification in relation to contracts, and it will be remembered that there can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. *Spackman v. Evans*, (1868) L. R. 3 H. L. 171; *Irvine v. Union Bank of Australia*, (1877) 2 A. C. 366; *Premila Devi v. The People's Bank of Northern India, Ltd.*, 41 Bom. L. R. 147. Where, however, an act

is *ultra vires* the articles, the company might alter the articles and adopt it. It is only where an act is *ultra vires* the company that it becomes wholly void and cannot be ratified in any event.

### Construction of the Object Clause

The subscribers to the memorandum have complete freedom in framing the object clause. It is for them to decide whether the objects should be wide or narrow. It is sometimes suggested that only the leading objects of the company ought to be specified and that the powers incidental to those main objects will always be implied in law. But Palmer disagrees with this view on the ground that it is men of business and not lawyers who have to work the memorandum.

Accordingly, it has been laid down by judicial authorities that the powers in the memorandum must be construed strictly, and the company may do anything which is fairly incidental to and consequential upon the powers specified. *Att.-Gen. v. G. E. Rly. Co.*, 5 A. C. 473; *Evans v. Brunner*, (1921) 1 Ch. 359; *Earnest v. Nicholls*, 6 H. L. 401.

For the purposes of construing the object clause, therefore, ordinary rules of construction applicable to all written documents, namely, that the expressed intention of the parties should be gathered from the whole document, that the meaning of the words should be ascertained by according popular sense to popular words and technical sense to technical words, should be applied. If and when necessary, the principle of *ejusdem generis* (of the same kind) may also be applied. There is no special rigid canon of construction to be applied to the object clause in a memorandum. *Egyptian Salt etc. Co. Ltd. v. Port Said Salt Association Ltd.*, (1931) A. C. 677.

In certain cases, the Courts have applied to the construction of this clause a variation or extension of this just and generous principle. They considered the dominant or main object of the company, and treated the powers given as being subsidiary to the main object and to be controlled by it. For instance, in *Stephens v. Mysore Reefs Ltd.*, (1902) 1 C. 1. 745, one of the objects of the company was to acquire gold mines in Mysore and elsewhere. The company wanted to work mines on the Gold Coast. It was held that the company could not do so because the main object of the company was to work mines in India and, therefore, the word 'elsewhere' must be confined only to India.

Such a mode of interpretation, however, might fetter the activities of the company and in order to prevent the Courts from putting such a narrow construction on the main clause, the draftsmen nowadays insert a clause that all objects of the company as set out in the memorandum are independent of the main object. Such was the case in *Cotman v. Brougham*, (1918) A. C. 514, and it was held

that effect must be given to such a clause and that it prevented the Court from taking a view that separate powers given by the clause must be regarded as subsidiary to the main object. It is, however, pointed out by Lord Parker (at p. 521) that if the question at issue is not "what are the powers of the company?" but if the question is "has the main substratum of the company gone?" so that it would be just and equitable to wind it up, it would be necessary to distinguish between power and object and to determine what is the main or paramount object of the company. It would then be proper to apply the former rule of construction as adopted in *Stephen's case* (*supra*) and in *Re Amalgamated Syndicate*, (1897) 2 Ch. 600. But it should not be applied to the question whether or not any particular transaction is *ultra vires*.

The decision in *Cotman's case* does not expressly overrule the view taken in *Stephen's case* where, indeed, the question was one of *ultra vires*, and the general words in a later paragraph were held to be cut down by reference to the 'main object' notwithstanding the presence of the words intended to exclude any such interpretation. Still, inasmuch as the principle laid down in the latter is inconsistent with that enunciated in the former, it is submitted that the latter decision being earlier in date is no longer good law.

#### **Rights and liabilities which may arise from doing *ultra vires* acts**

— (a) If a director of a company makes an *ultra vires* payment he can be compelled to refund the money. In *re Sharpe*, (1892) 1 Ch. 154. In this case, a director paid interest out of capital which was an *ultra vires* act. The company was afterwards wound up. It was held that the liquidator could compel the director's legal representatives to repay the money to the company. In such event, the question would arise whether a director who has thus been compelled to refund can get payment from the payee. It was decided in *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. 474 that the director who refunds the money to the company can get indemnity as against the person who receives the money from him with the knowledge that the payment to him was *ultra vires*, because, in that case, the payee would be in effect a constructive trustee of that money. It was also pointed out in *Moxham v. Grant*, (1900) 1 Q. B. 88 that the Common law rule that there could be no contribution between joint tort-feasors has no application to the case of a person receiving money from a director of a company with full notice and knowledge that such payment to him was *ultra vires*.

— (b) The directors of a company are its agents. Therefore, if they make contracts on behalf of the company, they warrant the authority of the company. But if the contract in question is *ultra vires* the company, the company can give no authority and, there-

fore, they may be made liable for implied warranty of authority. But they are liable only to such persons who have no notice that they have no authority to enter into a particular contract. And again, everybody is deemed to have notice of such registered documents as memorandum and articles (*infra*).

(c) Though a contract may be *ultra vires* the company and, therefore, void, it may have certain indirect effects. Firstly, if money or property obtained under *ultra vires* contract has been used to pay debts of the company, then, by the principle of subrogation, the creditor can to that extent stand in the shoes of those creditors of the company who have been paid off. *In re Wrexham Rly. Co.* (1899) 1 Ch. 440. Secondly, if the property handed over to the company by virtue of an *ultra vires* contract exists in specie or if it can be traced, the person handing it over can get it back. *Sinclair v. Brougham*, (1914) A. C. 398. Thirdly, if the money is lent by a company and the lending is *ultra vires*, the company can sue to recover it, because the debtor, when sued, would be in effect estopped from setting up a defence that the company had no power to lend. *In re Coltman*, 19 Ch. D. 64.

#### (4) CLAUSE LIMITING COMPANY'S LIABILITY

The fourth particular in a memorandum of association is a statement that the liability of the company is limited. In case of a company limited by shares, the effect of such statement is that if the company is wound up the members of the company will not be liable to contribute more than the amount unpaid on their shares. There is, however, one exception to this rule, viz., that, under section 147 of the Indian Companies' Act, if the number of members is reduced, in case of a private company, below 2 and, in case of a public company, below 7, and the business is carried on for more than 6 months thereafter, every person who is a member of the company during the time that it so carries on business after those six months and who knows this fact is personally liable for all debts contracted during that period.

#### (5) CAPITAL CLAUSE

Then comes the capital clause. The amount of the capital and the way in which it is to be divided into shares should be stated in that clause. The chief point to consider in regard to this clause is, what funds are necessary to set the business going or, if it is proposed to buy an old concern, what sum is wanted to pay its price and what, in addition, is wanted to keep the business going. It is generally advisable to have a certain reasonable amount of more capital and have some shares in reserve as unissued so that further capital may be raised if and when required.

## (6) ASSOCIATION CLAUSE AND SUBSCRIPTION

The association clause must state that the persons subscribing their signatures at the end of the memorandum are desirous of forming themselves into an association in pursuance of the memorandum. Then each of the subscribers must sign the memorandum in the presence of at least one witness who shall attest the signature [s. 9 (c)]. In the case of a company having a share capital, each of the subscribers is required to take at least one share and to write opposite to his name the number of shares he takes (ss. 6-8).

It may be noticed here that the only condition that the Act lays down for a subscriber of the memorandum is the taking of at least one share. Beyond this, there is nothing in the Act to suggest that the subscribers should be independent or unconnected, or that they should hold a substantial interest in the undertaking. The shares may be of the smallest nominal amount and one of such shares is enough to constitute membership. Accordingly, a company cannot be said to be not properly constituted only because some or one of the seven subscribers happen to hold a relatively small or a large number of shares. In an extreme case, the six holders of one share each may be trustees for the seventh person who holds all the rest, and yet the legality of the company is unimpeachable. In fact, the Act does not ensure more than a nominal plurality of persons for the purpose of forming a company. *Salomon v. Salomon & Co.* (1897) A. C. 22.

The subscribers of the memorandum have to pay for their shares, to sign the articles of association, to appoint the first directors and, if the articles so provide, to act as directors until the first directors are appointed.

## ALTERATIONS IN MEMORANDUM

A memorandum of association can be altered in regard to (i) the name of the company, (ii) the place of its registered office, (iii) its objects, (iv) its capital, (v) the rights attached to different classes of shares by the memorandum, and (vi) the limited liability of its directors.

It will be remembered that s. 10 of the Act provides that a company shall not alter the conditions contained in its memorandum except in the cases, in the manner and to the extent provided by the Act. These cases are just enumerated and the manner and extent of the alterations will be presently dealt with.

The alteration in regard to the name of the company has been already treated in the foregoing pages.

Alterations as regards (ii) and (iii) are treated in ss. 12 to 16 of the Act. A company can alter its memorandum in regard to these matters by passing a special resolution. But the alteration so made shall not take effect until it is confirmed by the Court on petition.

S. 12 further provides the limits within which a company can alter its objects. They may be altered so far as it may be necessary

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operation; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the memorandum; or
- (f) to sell or dispose of the whole or any part of the undertaking of the company; or
- (g) to amalgamate with any other company or body of persons.

The last two clauses have been added by the Amendment Act, 1936.

#### Procedure for alteration

The Court before allowing any alteration under this section must see that sufficient notice has been given to all persons whose interests are likely to be affected by the proposed alteration. It must also hear the objections, if any, of the creditors of the company and be satisfied that their consent is obtained or that their claims against the company are discharged or otherwise secured. Then it may allow the alteration, either wholly or in part, on such terms as it may think fit (ss. 13, 14). A certified copy of the order confirming the alteration together with a printed copy of the memorandum should then be filed with the Registrar within three months from the date of the order. The Registrar will, then, issue a certificate of registration. When the alteration involves a transfer of the office of the company from one province to another, the order and the altered memorandum should be filed with the Registrars of both the provinces and the certificates of registration should be obtained from both of them. The Registrar's certificate shall be conclusive evidence of the alteration and its validity (s. 15). If the alteration is not registered within three months or such further time as the Court may allow, it will become null and void. The Court may, however, revive the order of confirmation if sufficient cause for the default be shown on an application made within one month from the expiry of the initial period of three months (s. 16).

#### Discretion of Court

It will have been noticed that, apart from the restrictions laid down in s. 12 on the power of the company to alter its objects, the Court itself has a wide discretion in the matter. If the alteration, for



instance, seeks to effect a total change in the company's objects and if it is not clear on the evidence that the company as a whole wants the alteration, the Court may refuse to confirm it. If the alteration is one which is required to enable the company to do any of the seven enumerated things, the Court can confirm it wholly or in part; but if it is not so required, the Court has no jurisdiction to grant it. **Re Jewish Colonial Trust**, (1918) 2 Ch. 287. If the Court is of opinion that the company is not unanimous in getting the alteration, and that the alteration would defeat the main object of the company, it would refuse to grant such alteration. **Re Cyclists Touring Club**, (1907) 1 Ch. 269. Where the company's original object was to build a public hall with shops, and the building being destroyed by fire, the company sought to alter the memorandum by substituting shops, dwelling-houses and ware-houses for letting instead of the building of public hall, on a petition for confirmation of the alteration, it was held that the proposed alteration involved a fundamental change in the character of the company and, therefore, it could not be allowed. **Strathspey Public Assembly, etc. Co. v. Anderson's Trustees**, (1934) S. C. 385. On the other hand, where the memorandum of a company formed to improve and encourage the breeding of poultry contained a provision that no remuneration should be paid to the members of the governing body of the company, and the company owing to the increase in its business passed resolutions in general meetings providing for equitable remuneration to such members for services rendered, it was held on a petition to sanction the proposed alteration of the memorandum that it did not affect the real object of the company and that it was within the meaning of the words "to carry on its business more economically or more efficiently" as used in s. 5 (1) (a) of the Act of 1929. **In re Scientific Poultry Breeders' Association**, 101 L. J. Ch. 423.

#### Alterations in cases (iv), (v) and (vi)

The last three cases in which a memorandum can be altered may be split up as under.—

- (a) Increase of the share capital (s. 50);
- (b) Re-organisation of the share capital (s. 153);
- (c) Reduction of the share capital (s. 55);
- (d) Alteration of the rights of shareholders by a scheme of arrangement (s. 153); and
- (e) Alteration of the limited liability of directors into unlimited liability (s. 71).

All these cases will be dealt with at their appropriate places.

## LECTURE III

### ARTICLES OF ASSOCIATION

*Articles of Association—Effect of Articles—Alteration of Articles—Constructive Notice of Memorandum and Articles—Doctrine of ‘Indoor Management.’*

#### ARTICLES OF ASSOCIATION

The next step in the formation of a company is the preparation of the articles of association. ‘Articles’ are defined to s. 2 (1) of the Act:

“ ‘Articles’ means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the schedule annexed to Act XIX of 1857, or in Table A in the first schedule annexed to the Indian Companies’ Act, 1882, or in Table A in the first schedule to this Act.”

The main provisions regarding the articles of association will be found in sections 17 to 21 of the Act.

In the case of a company limited by shares, articles signed by the subscribers to the memorandum may be registered and they can adopt all or any of the regulations contained in Table A of the Act which provides regulations for the management of such a company. If no articles are registered, Table A applies. If they are registered, Table A applies except in so far as it is excluded by the articles [s. 17 (1) and (2) and s. 18].

In the case of a company limited by guarantee and in the case of an unlimited company, articles must be registered, though they may adopt any of the regulations contained in Table A. If the company has a share capital, the amount thereof must be clearly stated in the articles; if not, the number of members with which the company proposes to be registered must be stated [s. 17 (3) and (4)].

It must be noted, however, that the recent amendment of cl. (2) of s. 17 makes some of the regulations in Table A obligatory upon every kind of company. In fact, the articles of association of every company shall be always deemed to include those regulations. The numbers of these regulations are 56 (how a resolution will be deemed as passed), 66 (deposit of proxies at company’s office), 71 (general power of company vested in directors), 78 (rotation and retirement of directors), 79 (which directors to retire), 80 (re-election), 81 (general meeting may fill up vacancies), 82 (retiring directors to act till successors appointed), 95 (declaration of dividends), 97 (dividends out of profits only), 105 (inspection by members), 107 (profit and loss account), and 112 to 116 (provisions as to notices).

Regulations 78, 79, 80, 81 and 82, however, shall not be deemed to be included in the articles of a private company unless it is the subsidiary company of a public company.

Further, regulation 107 (profit and loss account) shall be deemed to require that a statement of the reason why, of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall otherwise determine.

The articles must be printed and signed by each subscriber of the memorandum in the presence of at least one witness who must attest the signature (S. 19). They should usually contain the following matters arranged in paragraphs numbered consecutively:—

- (a) Exclusion or partial exclusion of Table A;
- (b) Adoption of preliminary contracts, if any;
- (c) Number and value of shares;
- (d) Rules as to share certificates;
- (e) Rules as to calls on shares;
- (f) Rules as to company's lien on the member's shares for the amount not paid in respect of them;
- (g) Rules as to transfer of shares;
- (h) Rules as to borrowing powers;
- (i) Rules as to general meetings;
- (j) Rules as to directors their remuneration, etc.;
- (k) Rules as to dividends and reserves;
- (l) Rules as to accounts and audit; and
- (m) Rules as to winding up.

It will be remembered that articles are only the rules regarding the internal management of the company while the memorandum contains the conditions on which incorporation is granted to the company.

### EFFECT OF ARTICLES

S. 21 of the Act says that the memorandum and articles when registered with the Registrar of Joint-Stock Companies shall bind the company and the members thereof to the same extent as if they had been signed by each member and as if they contained a covenant on the part of each member, his heirs and legal representatives to be bound by them.

It would be easy to appreciate the effect and implications of this section by considering how far the memorandum and articles bind—

- (i) the members to the company;
- (ii) the members *inter se*;
- (iii) the company to the outsiders; and
- (iv) the company to the members.

(i) As between the members and the company, each member is bound to the company by a statutory covenant. In **Bradford Banking Co. v. Briggs**, 12 A C. 29, the articles provided that the company shall have a first and paramount lien upon each share for debts due to the company by the shareholder. One of the shareholders deposited his shares with a bank to secure an overdraft and the bank gave notice of the deposit to the company. It was held that shares deposited with the bank were bound by the articles just as if the shareholder had contracted with the company and, therefore, the lien which the company acquired under the articles on those shares precluded the bank from getting priority in respect of debts incurred by the shareholder before the notice was given.

But the company in its turn would have no right to priority in respect of money becoming due to it after it has received notice of the deposit. **Matheran Steam Tramway Co. v. Lang**, 33 Bom L R. 184. The company may receive notice either expressly from the depositor or impliedly. For instance, if a managing director of a company with all the powers of the board of directors pledges his own shares and neither the pledgee nor such director gives any notice of the pledge to the company, the company is deemed to have knowledge of the transaction. In such cases, it is the duty of the managing director to convey the information to the company and, if he neglects to do so, the company cannot escape liability on the ground of negligence of its officers. In the matter of **Union Indian Sugar Mills Co. Ltd.**, A I R. (1933) All. 607; **Pratt Ltd. v. Sassoon Ltd.**, 37 Bom L R 978.

Another illustration of the rule that a member is bound to the company by a statutory covenant is to be found in **Borland v. Steel Bros.**, (1901) 1 Ch 279. The articles in this case provided that if a shareholder became bankrupt, his shares should be sold to a certain person for a certain price. He became bankrupt. His trustee in bankruptcy claimed that he was not bound by the articles and, therefore, he could dispose of the shares as he liked. It was held that he was bound by the articles and that he took the shares subject to the agreement which was made by the shareholder.

It follows, therefore, that a company can sue its members for the enforcement of its articles as well as for restraining their breach.

(ii) As between the members *inter se*, each member of the company is bound by the articles to the other members. It is not, however, quite accurate to say that the articles and the memoran-

dum create an express agreement between the members of the company. The true position in this connection was explained by Lord Herschel in *Welton v. Saffery*, (1897) A. C. at p. 315. If it is true that each member is bound to every other member by a contract, it would be open to each member to sue any or every other member if any of the articles be infringed. But that is not the case. And if it were, it would make the management of the company impossible. So, it was laid down in *Burland v. Earle*, (1902) A. C. 83, that in order to redress a wrong done to the company, or to receive money alleged to be due to the company, the action should *prima facie* be brought by the company. That is not a matter for the individual shareholder. *Bhajekar v. Shinkar*, 36 Bom. L. R. 483. The only exception to the rule is when the persons against whom relief is sought control the majority of shares and will not allow an action to be brought in the name of the company. In that event, the complaining shareholders may sue in their own names, but they must show that the acts complained of are either fraudulent or *ultra vires* and not mere informalities or irregularities. No suit, in such a case, can be thrown out on the ground that the plaintiffs did not consult the views of the majority before they instituted the suit as to whether the litigation should be undertaken. *Baillie v. Orient Telephone Co.*, (1915) 1 Ch. 503, 518; *The Dhakeshwari Cotton Mills, Ltd. v. Nilkamal, A. I. R.* (1937) Cal. 645. Further, it would also seem that if a member of the company proposed to interfere with the rights of another member of the company which are secured to him by the articles, the latter might sue to enforce those rights, that is, the rights in addition to what he has in common with the other members of the company. Thus, in *Pulbrook v. Richmond Consolidated Co.*, 9 Ch. D. 610, a director was allowed to sue other directors to restrain them from wrongfully excluding him from the meetings of the directors.

(iii) Thirdly, as between outsiders and the company, neither the memorandum nor the articles give any right to outsiders against the company though their names may have been mentioned in these documents in connection with arrangements that the company might have contemplated for carrying on its business. *Eley v. Positive Life Insurance Co.*, 1 Ex Div. 88; *Ramkumar v. Sholapur Spg. & Wvg. Co. Ltd.*, 36 Bom. L. R. 907.

In *Eley's* case, the articles contained a clause that the plaintiff would be the solicitor of the company and should not be removed except for misconduct, but the company, after some time ceased to employ him. The plaintiff thereupon sued the company for breach of contract. It was held that he had no cause of action and that the suit was incompetent. The reason for the decision was that the articles constituted a contract between members *inter se* and to that

contract the plaintiff was a stranger. This reasoning equally applies to a contract made with a member of the company provided such contract is not made in his capacity as a member. In *Eley's case*, the plaintiff was in fact a shareholder of the company but he did not seek to enforce a right which belonged to him as a shareholder in common with others.

The principle of this case was followed in *Browne La Trinidad*, 37 Ch. D. 1. The Courts, however, realizing the harshness of the rule, later introduced a modification to it. Accordingly, if a person has entered into a contract with a company to serve as a director the articles may be referred to show what are the terms of the contract, and in this way, the provisions of the articles having been incorporated in the contract may be enforced as part of the contract. Thus, where the articles required the directors to have the share qualification as set out therein and fixed their remuneration at £1,000 a year, it was held that, though the articles did not constitute a contract between the company and the directors, the directors accepted the office on the footing of the articles and, therefore, the terms of the articles became a part of the contract with the company which the directors could enforce. *New British Iron Co.*, (1898) 1 Ch. 324. The principle thus modified is equally applicable both in case of members as well as outsiders. *Issac's case*, (1892) 2 Ch. 158. Relying upon these two cases, the Lahore High Court held in a recent case that, where in a suit for a declaration that the plaintiff was the managing director of the defendant company, it was proved that he was the promoter of the company and being described as the first managing director in the articles of association acted as such for 11 years and was remunerated according to the terms of the said articles, an implied contract between the plaintiff and the company enabling him to get the declaration prayed for was established in the circumstances of the case even though the memorandum and the articles did not constitute a contract in themselves. *Gulab Singh v The Punjab Zamindari Bank, Ltd.*, 24 Lah. 28. Accordingly, where the only contract between a director and the company was that contained or evidenced in the articles, his employment as such was held to be conditional on the continued existence of the company and to have ceased automatically when it was wound up. *Farrer, Ltd., In re*, (1937) Ch. 352.

(iv) In the last case, the question as to whether and how far the memorandum and articles bind the company to the members is not free from doubt. According to one view, the company is bound just the same way as members. According to another view, the company is not wholly bound because it is said that the company is bound only if the members had covenanted, and not as if the company and the members had covenanted with each other.

Remarks in this connection are to be found in **Hickman v. Kent Sheep Breeders' Association**, (1915) Ch. 881. As a matter of fact, however, Courts do not appear to be prepared to commit themselves to any of these views. They have chosen to take an intermediate course. **Hickman's** case decides that it is not true to say that the company is wholly bound so that any member can enforce any article against it, but the company is bound to this extent, namely, that any member can sue the company to prevent any breach of the articles which would affect his right as a member of the company. The same view was adopted by Marten C. J. in **Maneklal v. Suryapur Mills Co. Ltd.**, 30 Bom L R 549. So, for instance, an individual member of a company is entitled to maintain a suit against the company to establish and enforce his right to vote in pursuance of the articles **Shrinivahan v. Watrap**, 61 M. L. J. 724.

#### ALTERATION OF ARTICLES

S. 20 of the Act gives very wide powers to a company to alter or add to its articles by special resolutions. It should be noticed that they can never be altered by general resolutions although the articles may provide for the procedure. **Navanilal v. Scindia Steam Navigation Co. Ltd.**, 22 Bom L R 1362. The second point to note is that the alterations should not contain anything illegal, and should not go beyond the powers specified in the memorandum. And the third and the last point to bear in mind is that though the power of the company to alter its articles is unlimited and all the members are bound by the alterations that may be made from time to time, any alteration either in the memorandum or the articles, which seeks to impose an additional liability on a member of the company to take shares more than what he has already taken or to pay any more money than what he is liable to pay on his shares, shall not be binding upon him unless he agrees in writing either before or after the alteration to be bound thereby (s. 20A introduced by the Amendment Act, 1936). In England, too, a similar provision is made in s. 22 of the Act of 1929, and the doubt which was at one time expressed on this point by the House of Lords in **Biddulph Agricultural Society v. Agricultural Society**, (1927) A. C. 76, is now cleared once and for ever.

Barring the aforesaid statutory limitations upon the power of a company to alter its articles, there are certain other limitations prescribed by judicial decisions. They are:—

- (1) The alteration should not constitute a fraud on the minority;
- (2) It should be made *bona fide* for the benefit of the company as a whole; and
- (3) It should not enable the company to commit a breach of a contract with an outsider.

The first limitation is well illustrated by the case **Menier v. Hoopers' Telegraph Works**, 9 Ch. 350. In this case, the majority of the members of company A were also members of company B. At a meeting of company A, the members passed a resolution to compromise an action against company B in a manner favourable to B and unfavourable to A. It was held that the minority of company A can have the compromise set aside. This principle was also applied in a later case of **Brown v. Abrasive Wheel Co.**, (1919) 1 Ch. 290.

An illustration of the second limitation is furnished by **Sidhottam v. Kershaw**, (1920) 1 Ch. 154. The company in this case was a private one and the majority of shares were held by the directors. The articles were altered in such a way as to give the directors power to compel any member who carried on business in competition of the company to transfer his shares at their full value to a nominee of the directors. The plaintiff who carried on such business voted against the resolution altering the articles and, on the resolution being passed, he brought an action for a declaration that the alteration was invalid. It was held that the alteration was valid inasmuch as it was made *bona fide* and in the interests of the company.

Lastly, a company cannot alter its articles in breach of a contract with an outsider. **British Murac Rubber Syndicate v. Alpertons Rubber Co.**, (1915) 2 Ch. 186, **Allen v. The Gold Reefs Ltd.**, (1900) 1 Ch. 656. The same principle would apply to a "special" contract between a company and a member thereof but not where there is no special contract. In **Nelson v. James**, (1914) 2 K. B. 770, there was a special contract between the plaintiff who was one of the directors and the other directors on behalf of the company as regard his appointment as a managing director, and it was held that the directors could not revoke the appointment at will or otherwise than in accordance with the agreement under which the appointment was made. The principle was also applied by Page, J. in **Harischandana v. Hindustan Insurance Society**, 52 Cal. 239. Similarly, where, during the currency of an agreement appointing the plaintiff, who was then a director, managing director of a company for ten years, new articles of association were adopted whereby another company which had acquired nearly all the shares in the first company was given power to remove any director, and the office of a managing director was made subject to determination if he ceased to be a director, and before the expiration of the agreement the plaintiff was removed from his office of the director by the latter company in exercise of its power whereupon the plaintiff also ceased to be the managing director, it was held that, as by the contract and the then existing articles the company had no right to remove the plaintiff, it was an implied term of the agreement that they would not by



any alteration in the articles create such a right and exercise it during the period of his appointment, and that the plaintiff's removal was a breach of the agreement by the first company counselled and procured by the second company, and that the plaintiff was entitled to damages against the two companies. *Shirlaw v. Southern Foundries, Ltd.*, (1939) 2 K. B. 206 affirmed in (1940) A. C. 701. On the other hand, in *Shuttleworth v. Cox*, (1927) 2 K. B. 9, it was contended for the plaintiff that a particular article in its original form constituted a contract between him and the company that he should be a permanent director for life except in the events specified in that article and it was a contract which could not be varied without the consent of both parties. It was held by Scrutton, L. J. that the argument would have been sound if he could have shown a contract outside the articles under a separate document altogether as was the case in *Nelson v. James* (*supra*).

It will, therefore be noticed that, subject to these limitations, the power of a company to alter its articles is very large. Such power is statutory and, therefore, the company cannot, even by a clause in the articles or by a contract that they shall not be altered, make the articles unalterable because that would be tantamount to offending against the statute itself. *Walker v. London Tramways Co.*, 12 Ch. D. 705; *All India Railwaymen's Benefit Fund v. Baheshwarnath*, 1 L.R. (1945) Nag. 599. The Court has, however, no jurisdiction to order rectification of the articles even on the ground of a common mistake. *Scott v. Frank F. Scott (London) Ltd.*, (1940) Ch. 794.

The view which at one time prevailed that an alteration which amounted to a change in the constitution of the company in point of rights of shareholders was not valid was ultimately overruled in *Andrews v. Gas Metre Co.*, 1 Ch. 361. In this case, the memorandum gave power to the company to increase its capital when necessary, but did not provide for issuing preference shares for the purpose. The company by a special resolution altered the articles so as to give itself power to issue such shares. It was held that the alteration was good as the memorandum did not forbid the issue of preference shares and that it was immaterial that the new power altered the composition of the company. The principle on which this case was decided was that the Act required a company's memorandum only to state the amount of the share capital and the number of shares into which it was divided and not the rights of the shareholders in respect of their shares nor the terms on which additional capital might be raised. These are really matters to be regulated by the articles, and unless dealt with in the memorandum, may be determined by the company from time to time by special resolutions. No alteration could, of course, be made in respect of any matter which

must be regulated by the memorandum unless it is permitted by s. 10 of the Act.

### Retrospective effect of alterations

Alterations in the articles are also regarded as having a retrospective effect. *Allen v. Gold Reefs (supra)*. In this case, the articles gave the company a lien on all shares 'not fully paid up' for calls due to the company. A was the only shareholder of fully paid up shares but he owed money to the company for calls due on other shares. A died. The company altered its articles by striking out the word 'not fully paid up.' It was held that the alteration was good for it was for the benefit of the company as a whole and that the company, in virtue of the alteration, acquired a lien also on the fully paid up shares of A since he took them subject to the original articles and the power of altering them given to the company by the Act, and did not make any special or implied bargain that they should not be affected by any subsequent alteration of the articles.

### CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES

It will be noticed a little later that both the memorandum and articles of association should be registered with the Registrar of Joint Stock Companies before a company can acquire a corporate form under the Act. It will, therefore, be necessary to know the way in which the fact of their registration affects the persons who have dealings with the company.

These two documents on registration assume the character of public documents and every person dealing with the company is deemed to have notice of their contents: *Pratt, Ltd., v. Sasoon & Co. Ltd.*, 37 Bom. L. R. 978 affirmed by the Privy Council in 40 Bom. L. R. 1109. The result is that if a person deals with the company in a way which it is not entitled to do, the person dealing with it takes its consequences. For instance, if the articles provide that a bill of exchange must be signed by two directors, a person who has a bill signed by only one director can not claim payment upon it.

### DOCTRINE OF 'INDOOR MANAGEMENT'

There is, however, one limitation to this doctrine of constructive notice, namely, that so far as the internal proceedings of the company are concerned, strangers dealing with the company are entitled to assume that everything has been regularly done. This limitation is generally known as the doctrine of 'indoor management' and was first laid down in *The Royal British Bank v. Turquand*, (1856) 6 E. & B. 327. The directors, in this case, gave a bond to T and they had a power under the articles to issue such bonds provided they were authorised by a proper resolution of the company. In fact, no such resolution was passed. It was held that T could sue on the bond on the ground that he was entitled to assume that the resolution had

been passed. Persons dealing with the company are bound to read the registered documents and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of internal proceedings of the company. *Biggarstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; *Day v. Pullinger Engineering Co.*, (1921) 1 K. B. 77; *British Thomson Co. v. Federated Bank, Ltd.*, (1932) 2 K. B. 176; *Damodara v. Indian National Agency, Ltd.*, I.L.R. (1945) Mad. 728.

### Exceptions to the doctrine of 'Indoor Management'

(i) This doctrine, however, will not apply where the person dealing with the company has notice of the irregularity. *Howard v. Patent Ivory Co.*, 30 Ch. D. 156. In this case, the directors had a power to borrow money, but if they borrowed more than £1,000 they had to get the consent of the shareholders at a general meeting. Without such consent they borrowed £2,500 from themselves and took debentures. It was held that as they had notice of the internal irregularity, their debentures were good only to the extent of £1,000.

Another illustration of this exception is furnished by Pratt's case (*supra*). S, a private limited company financed another company M which, in its turn, financed a third company P. The personnel of directors of M and P were identically the same and one of the directors was the managing director of S. Some time after the dealings had started, a sum of Rs. 4½ lakhs was found due by M to S and by P to M in turn. S pressed both M and P to secure the amount, and P deposited title deeds of its property in Bombay with S for that purpose. A little later, it was decided at a meeting of the board of directors of P to execute an agreement of equitable mortgage so created. On the same day, the same set of directors met for M and passed a similar resolution. A deed was eventually executed in which M was described as the mortgagor, P as the surety and S as the mortgagee. Subsequently, P was ordered to be wound up compulsorily, and, in the liquidation proceedings that followed, S claimed to be a secured creditor of P for Rs. 4½ lakhs and interest due thereon. It was contended on behalf of the liquidator that the mortgage was void under s. 91B of the Act. It was held (1) that by virtue of s. 91B of the Act, none of the directors of P was competent to vote for the resolution to execute the mortgage in favour of S as the board of P was not independent of that of M and there was a conflict of interest in the matter of mortgage between M and P, (2) that S must be deemed to have had notice of this disability of the directors of P as the managing director of S who was in duty bound to protect the interests of the company was also a director of both P and M, and (3) that the resolution of the directors of P to execute the mortgage was void.

the mortgage in favour of S was also void and could not be protected under the rule in *Royal British Bank's* case.

This case points out that the doctrine of 'indoor management' does not apply even where a person having a dealing with the company has an implied or constructive, as distinct from actual notice of the irregularity in the internal proceedings of the company.

(ii) Another exception to the doctrine of 'indoor management' is where the acts done in the name of the company are void *ab initio*. Where, for instance, a share certificate was issued by a secretary of a company without authority, and he forged the signatures of two of the directors which were required under the articles it was held that the certificate was a nullity and the party defrauded simply lost his money as he was not a shareholder. *Ruben v Great Fingall Consolidated*, (1906) A.C. 439. As Lord Loreburn, L.C. observed in this case the doctrine of indoor management only applies to irregularities that otherwise might affect a genuine transaction, but it cannot apply to a forgery. A company can never be held bound by forgeries committed by its officers. The principle of this decision has been followed in *Kreditbank v Schenkers, Ltd.*, (1921) 1 K.B. 826 and in *South London Greyhound Race Courses, Ltd v Wake*, (1931) 1 Ch. 496.

## LECTURE IV

### PRELIMINARY CONTRACTS, PROMOTERS AND REGISTRATION

*Preliminary Contract—Promoters' Registration and Incorporation—Certificate of Incorporation—Commencement of Business*

#### PRELIMINARY CONTRACTS

When a company is formed to buy an existing business, a contract is sometimes made between the vendor of the business and some person who acts as an agent or a trustee for the company about to be formed. The position in such contracts is rather curious for the person who acts as an agent or a trustee for the company which has not yet come into existence because no person, as a matter of law, can act as an agent or a trustee for an entity which is not in existence. The first legal difficulty that arises in such cases, therefore, is that the company when formed can neither be bound by such a contract nor has it any right under it. On the other hand the person who makes the contract on behalf of the company is and remains the only person liable to the vendor and can also sue him on that contract. The company cannot save him from this position by ratifying the contract after its formation because in order to bring into effect the doctrine of ratification, an agent must have contracted for

been passed. Persons dealing with the company are bound to read the registered documents and to see that the proposed dealing is not inconsistent therewith. But they are not bound to do more; they need not inquire into the regularity of internal proceedings of the company. *Biggarstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93; *Day v. Pullinger Engineering Co.*, (1921) 1 K. B. 77; *British Thomson Co. v. Federated Bank, Ltd.*, (1932) 2 K. B. 176; *Damodara v. Indian National Agency, Ltd.*, I.L.R. (1945) Mad. 728.

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## LECTURE IV

### PRELIMINARY CONTRACTS, PROMOTERS

#### AND

### REGISTRATION

*Preliminary Contracts—Promoter Registration and Incorporation—Certificate of Incorporation—Commencement of Business*

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a principal who is in existence and competent to contract. S. 196 of the Indian Contract Act, 1872; *Imperial Ice Co. v. Munchershaw*, 13 Bom. 415. The only way out for the company is to enter into a new contract with the vendor which may be entirely on the same basis and in the same terms as embodied in the previous contract made by the agent. *Natal Land & Colonization Co. Ltd. v. Pauline Colliery & Development Syndicate, Ltd.*, (1904) A. C. 120; *B. B. L. Rly. Co. v. Dist.-Board, 24-Paraganas*, A.I.R. (1946) Cal. 23. For instance, in *Re English and Colonial Produce Co.*, (1906) 2 Ch. 435, a solicitor, on the instructions of persons who later became the directors of the company, prepared the memorandum and articles before its formation. It was held that the company was not liable to pay the solicitor's costs although it had taken the benefit of his work. Even the fact that the adoption of the preliminary contract is made as one of the objects of the company in its memorandum or articles, or that the company has passed a resolution to adopt it will not create a contract between the company and the other party. *North Sydney Investment Co. v. Higgins*, (1889) A. C. 263, *Ramkumar v. Sholapur Spg. & Wvg. Co. Ltd.*, 36 Bom. L. R. 907. The company can only be bound by it if it enters into a new contract after its formation.

Accordingly, whenever a contract is made for and on behalf of a company prior to its incorporation, it has now become usual to stipulate that if the company makes a contract in terms of the preliminary contract, the agent's liability shall cease; if, on the other hand, the company does not do it within a limited time, either of the parties shall have a right to rescind it.

Again, where a contract is made by a person as a trustee for the company, the position is in no way different. In *Northumberland Avenue Hotel Co.* 33 Ch. D. 17, the facts were these. On July 24, 1882, W took a building lease from the Metropolitan Board of Works and agreed on the same day to underlease the property to D as a trustee of the company about to be formed. The company was formed the next day. The articles adopted the contract and the company made no fresh agreement with W. The company thereafter entered into possession and acted on the agreement which, it erroneously thought, was binding upon it. The Company, however, failed to fulfil the agreement adopted by it, and W in his turn also failed to fulfil his part of the contract with the Board to finish the building within the stipulated time. The Board thereupon re-entered. W went bankrupt and his trustee in bankruptcy claimed damages as against the company for non-fulfilment of the contract. It was held that he had no cause of action as there was no contract between W and the company.

There may be cases, however, where a new contract in terms of the preliminary contract may be inferred from the acts of the com-

pany after its incorporation. *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A. C. 120 at p. 126.

To the aforesaid rule, however, what may be called an exception is provided in s. 23 (h) and s. 27 (e) of the Specific Relief Act, 1877. The former provides that where the promoters of a public company have, before its incorporation, entered into a contract, for the purposes of the company, and such contract is warranted by the terms of incorporation, the company can sue for the specific performance of such a contract although it has not been newly entered into. The expression "for the purposes of the company" was considered in *Imperial Ice Manufacturing Co. v. Muncherslaw* (*supra*), and it was held that a contract by a person with the promoters of the company to take a certain number of shares of the company when formed was not a contract for the purposes of the company, and that, therefore, the allotment of shares to such a person by the company, if nothing is done by him amounting to an acceptance of the allotment, did not make him a shareholder or entitle the company to sue him for the unpaid calls on those shares. S. 27 (e) of the Specific Relief Act, 1877, provides that when the promoters of a public company have, before its incorporation, entered into a contract, specific performance of such contract can be enforced against the company provided that the company has adopted and ratified the contract and the contract is warranted by the terms of the incorporation. These sections, it was observed in the above case, were intended to apply only to contracts for the working purposes of the company such as a contract for the supply of machinery for making ice. They only crystallize the English law as to cases where the company has taken the benefit of a contract, but refuses to carry it into full effect. The liability declared in s. 27 (e) was established in England by decisions given in courts of equity, partly on the ground of a distinct obligation having been either imposed on the company in its original constitution or assumed by it after its formation, and partly on a ground independent of contract and analogous to estoppel, namely, that where any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted, must not exercise its powers to the prejudice of that person and in violation of those terms. The company's right to sue for specific performance under s. 23 (h) is said to be deduced, on the principle of mutuality, from its liability. *Fry's Specific Performance*, 5th edn. 121.

## PROMOTERS

Along with the question of preliminary contracts it would be worth while to know something about the persons who act on behalf



of the company before its incorporation and make contracts. These persons are called 'promoters' of the company. They are persons who form or float a company. They take all necessary steps to create it and set it going. These persons are in fact typical promoters who take a conspicuous part in the formation of the company. But a person may find himself saddled with the liabilities of a promoter although he takes very little active part in the formation of a company, e.g., to agree to place shares, or to obtain a director. Whether a person is a promoter or not is not a question of law. The Act does not define what a promoter is, but a number of judicial decisions have attempted to explain that term. The best description of the term is to be found in the judgment of Bowen, L. J. in *Whaley v. Green*, 5 Q.B.D. 111, where it is stated that it is not a term of law, but of business, usefully summing up in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence.

A person, however, cannot be held to be a promoter because his signature appears at the foot of the memorandum of association of the company and he takes, for instance, 100 shares of the 1,200 initially subscribed. Nor can the fact that the money paid by him in respect of those shares was utilized in paying the expenses of the formation of the company make him a promoter of the company. *G. Tiruvengadachariar v. Velu Mudaliar*, (1938) Mad. 192.

Whether the vendors to a company are or are not promoters of the company depends on the facts relating to the transaction of sale. Suppose, for instance, they are approached by third persons who offer to buy their property, with a view to re-sell to the company. In that event, the vendors will not be regarded as promoters. If, however, they take in their hands the getting up of the company in order that the company may buy their property, they will be regarded as promoters and they cannot escape the liability merely by interposing a nominal vendor or a promoter of the company in the transaction. *Iron Ore Co. v. Bird*, 33 Ch. D. 85.

#### Promoter's duty to disclose

The relationship between a promoter and a company floated by him is of a fiduciary character and, therefore, he becomes answerable to it for the manner in which he created the company. *Erlanger v. Sombrero Phosphate Co.*, 3 A. C. 1218. Lord Blackburn, after pointing out the extensive powers possessed by promoters, observed in this case:

"Those who accept and use such extensive powers are not entitled to disregard the interest of the corporation altogether. They must make a reasonable use of the powers which they accept from the legislature; and, consequently, they do stand, with regard to that corporation, when formed, in what is commonly called a fiduciary relation to some extent."

As a necessary consequence of this principle, it follows that the promoters are under a duty to disclose fully all material facts relating to the formation of the company. The whole transaction should be disclosed where any preliminary contract is made, *Gluckstein v. Barnes*, (1900) A. C. 240; *Re Olympia, Ltd.*, (1898) 2 Ch. 153.

The facts in *Olympia's* case were that the old Olympia company was in difficulties and the debentures were worth very little. X, Y and Z as trustees for a syndicate bought up the debentures for sums much below the amount they realized and made a profit of £20,000. Then they bought Olympia for £1,40,000 and sold it to a new company for £1,80,000. X, Y, Z became directors of the new company. They disclosed their latter profit but not the first one of £20,000. It was held that there was no sufficient disclosure and X, the appellant, must pay that portion of £20,000 which had been paid to the trustees as his share.

A disclosure must be actual and express. A constructive disclosure is not enough. In the above case, X sought to protect himself by contending that it was stated in the prospectus that the profits made by the syndicate on *interim* investments were excluded and it was held that it was no disclosure.

Furthermore, to be a good disclosure, it must be made to a body of persons acting on behalf of the company who can exercise independent judgment. A disclosure made by a promoter to a board of directors who are promoters themselves or their nominees is no good in law. This point was also taken in the above case and it was contended that X and his fellow trustees had disclosed the fact to the directors who were like himself the promoters of the company, and it was held that the disclosure was not proper.

In view of these principles, it may be said that it is the duty of promoters to provide the company with an independent board of directors to whom the necessary disclosures may be made. The true position in this behalf, however, is stated by Lindley, M. R. in *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392:

"Notwithstanding all that has been said in *Erlanger's* case . . . that does not require, or indeed justify, the conclusion that if a company is avowedly formed with a board of directors who are not independent, but are stated to be the intended vendors or the agents of the intended vendors of property to the company, the company can set aside an agreement entered into by them for the purchase of such property simply because they are not an independent board. After *Salomon's* case, I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors if the real truth is disclosed to those who are induced by the promoters to join the company."

Accordingly, if all the members of the purchasing company are by the articles and prospectus or otherwise made aware of the real facts of the case, the want of an independent board will not invalidate

the agreement on the doctrine of *volenti non fit injuria*. **Salomon v. Salomon (1897) A. C. 22.**

### Promoter's Liabilities

A promoter of a company will be answerable for all his acts from the time he sets out to form the company. He will not, however, be answerable for any secret profits that he may have made in any transaction entered into on behalf of the company if the company is not formed. The liability arises as soon as the company comes into existence, and the promoter will be in duty bound to render a full account of all the secret profits he may have earned and to make them good to the company. It may, therefore, be said that though the fiduciary relation really begins when the company is formed, the fiduciary obligation of a promoter begins as soon as he sets out to act for or promote the company. **Ladywell Mining Co. v. Brookes, 35 Ch. D. 400.** In this case, five persons bought a mine for £5,000 on the 1st of February, 1873, with a view to sell it to a company about to be formed. At the time, they took no steps to form a company and they paid for the mine out of their own pockets. On the 4th of April, 1873, they entered into a provisional contract with the trustees for the intended company to sell the mine for £18,000. On the 18th of April, the company was registered, and it adopted the agreement of the 4th of April. Four of the vendors were the directors. The contract of the 1st of February was not disclosed to the company and the company sued the vendors to recover their profit of £13,000. It was held that the vendors were not promoters when they bought the mine and, therefore, they were under no fiduciary duty to the company to account for the profit they made.

In this connection, there are three possible positions which a promoter might occupy:—

- (1) He may be a promoter to acquire the property for the company, or
- (2) He may acquire the property himself and then decide to form a company and sell the property to it, or
- (3) He may acquire the property with a view to resell to the company which he intends to promote.

In the first case, all the rules of agency apply. Accordingly, any profit he may make will belong to the company. A contract may be rescinded by the principal, i.e., the company, if it discovers that the agent without disclosing the fact is really selling his own property.

In the second case, no question of agency or trusteeship can arise. He can make what bargain he chooses with the company without incurring any corresponding obligation to disclose or make over his profits to the company.

In the last case, the promoter becomes bound by the fiduciary obligation. This does not mean that he cannot sell the property to the company at a profit, but only that he must disclose the fact of the transaction to the company. *Omnium Electric Palaces v. Baines*, (1914) 1 Ch. 332. Otherwise, the company may set aside the contract.

The remedy of rescission is possible only when the parties could be relegated to their original position. If, for any reason, the original position cannot be restored, but the prospectus is fraudulent, the company can get damages as against the promoter and the measure of damages will be the profit which the promoter had made upon the purchase and re-sale of the property. *Re Leeds Theatre Varieties*, (1902) 2 Ch. 809. If, however, the prospectus is not fraudulent and rescission is not possible then apparently, the company has no other remedy. *Re Lady Forrest Gold Mine, Ltd.*, (1901) 1 Ch 582.

Promoters who take part in the issue of prospectus are further responsible to the shareholders for statements made therein (vide Lecture V) In the case of winding up of a company, they may be made liable for misfeasance or breach of trust by means of a misfeasance summons taken out by the Official Liquidator or a contributory and they can be examined as to their dealings either privately or publicly.

The death of a promoter does not relieve his estate from liability or his fiduciary duties (*Concha v Murrieta*, 40 Ch. D. 553) nor does his bankruptcy discharge him therefrom.

#### Promoter's remuneration

A promoter is entitled to a reasonable remuneration. The modes in which promoters are remunerated vary considerably. For instance, the vendors may agree to pay him a commission on the sale of their property to the company or the promoter may purchase a property and re-sell it to the company at profit, or he may be given what are called deferred or founders' shares fully paid up in consideration of the services effected by him to the company. In some cases, the articles empower the directors to remunerate the promoters but, it will be remembered, that would not give the latter any contractual right against the company. *Rotherham Alum, etc. Co.*, 25 Ch. D. 103.

#### REGISTRATION AND INCORPORATION

Now, going to the fourth stage of forming a company, namely, of registration, there must be produced before the Registrar of Joint-Stock Companies the memorandum and articles of association, the list of persons who have consented to become directors, a statutory declaration by an advocate, attorney or pleader of a High Court who is engaged in the formation of the company, or by a person named in the articles as a director, manager or secretary of the company that the requirements of the Act as to registration have been complied with [s. 24 (2)] and, save in the case of a private company,

a consent in writing by those who are appointed to act as directors of the company (s. 84). Thereafter, the proper stamp duty for registration has to be paid, and the Registrar then enters the name of the company on the register of companies and issues a certificate of incorporation. The company then comes into existence as a legal entity.

### CERTIFICATE OF INCORPORATION

Under s. 24 (1) of the Act, the certificate of incorporation is conclusive evidence that all the requirements of the Act in regard to the formation and registration of the company have been complied with and that the association is a company authorised to be registered and duly registered under the Act. The reason of this provision is that it would be disastrous if, years after, it was possible to rake up the circumstances connected with the formation of the company to show that it was not properly constituted. Accordingly, although the memorandum be found to be materially altered after signature and before registration (*Peel's Case*, 2 Ch. App. 674), or is signed by only one person for all the seven subscribers, or the signatories be all infants (*Moosa v. Ebrahim*, 40 Cal. 1. P.C.), the certificate would be all the same conclusive, and no Court has any power to annul the incorporation. There would not be any difference in the position even if the objects of the company are found to be illegal. *Bowman v. Secular Society*, (1917) A. C. 406. As stated by Lord Hatherley, L. C. in *Princess of Reuss v. Bos*. (1871) L. R. H. L. 176 at p. 193:

"If (the company is) created, there is no power given in this Act of Parliament nor in any other Act of Parliament that I am aware of, by which, through any result of a formal application like an application for *scire facias* to repeal a charter, the company can be got rid of, unless.... by...winding up."

It has been, however, observed by Lord Parker in *Bowman's* case that if all the objects of the company are illegal, they would be not rendered legal by the certificate but it would be open to the Court to stay its hands until an opportunity had been given for taking the appropriate steps for the cancellation of the certificate of incorporation. It should be observed that neither s. 1 of the Companies' Act, 1900, nor the corresponding section of the Companies' (Consolidation) Act, 1908, nor of the Act of 1929 is to bind the Crown, and the Attorney-General on behalf of the Crown, can, therefore, institute proceedings by way of *certiorari* to cancel a registration which the Registrar in affected discharge of his quasi-judicial duties has improperly or erroneously allowed.

The true effect of a certificate of incorporation was explained by Lord Finlay, L. C. in the above case. He held that if the objects of a company were illegal, they were illegal in the sense that the law would not aid in their promotion, and their illegality was not amended by the certificate; what the legislature was dealing with was the

validity of the incorporation, and it was for the purpose of incorporation, and for that purpose only, that the certificate was made conclusive. In the words of Lord Parker, the section does preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts.

Accordingly, if any money were due to a company with illegal objects, it is entitled to claim it from the debtor and the latter will not be heard to discuss the probable uses to which the company would put the money so claimed. It can, however, in no event seek the assistance of the Court in carrying out the objects of the memorandum. *Bowman's case* (*supra*). The secular society in this case was registered as a company, limited by guarantee, under the Companies's Acts, 1862 to 1893. The main object of the company, as stated in its memorandum was "to promote . . . the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief and that human welfare in this world is the proper end of all thought and action." It was held that the object was not illegal in the sense of rendering the company incapable in law of acquiring property by gift and that a bequest 'upon trust for the Secular Society, Limited' was valid.

### COMMENCEMENT OF BUSINESS

A private company on incorporation is entitled to commence business and exercise its borrowing powers, notwithstanding that the minimum subscription is not subscribed and the directors have not paid their proper proportion on their shares [s 103 (6)].

But other companies under the Act cannot do so. They must comply with the conditions set out in s 103 of the Act. Under this section, a company cannot commence business unless—

- (a) the minimum number of shares which have to be paid for in cash has been subscribed and allotted;
- (b) every director has paid, in respect of shares for which he is bound to pay, an amount equal to what is payable on shares offered to the public on application and allotment;
- (c) a statutory declaration by the secretary or one of the directors that the requirements of the Act have been complied with is filed with the Registrar; and
- (d) if the company does not issue a prospectus, a statement in lieu of prospectus is filed with the Registrar.

After these ceremonies have been gone through, the Registrar grants a certificate whereby the company becomes entitled to commence business. Such certificate shall be conclusive evidence that the company is so entitled. If default is made in the observance of these formalities and the company commences business or exercises

its borrowing powers, every person who is responsible for the default shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the default continues.

It may be also noted that the provisions as regards shares contained in this section do not apply to a company limited by guarantee and not having a share capital.

In spite of this section, however, a company can make contracts in regard to its intended business, but they are regarded as only provisional and do not bind the company until it becomes entitled to commence business [s. 103 (3)]. These contracts would also include preliminary contracts which have been newly entered into by the company after its incorporation. If, however, the company does not obtain the minimum subscription, and is thereby prevented from getting a certificate entitling it to commence business, the contracts become void, and probably even the contract of the signatories to the memorandum to take shares as specified against their names becomes inoperative. *Re Otto Electrical Co.*, (1906) 2 Ch 390.

## LECTURE V

### PROSPECTUS

*Prospectus*.—Contents of a prospectus—Prospectus by implication—Saving of liability for misstatements, etc—Condition to waive compliance with s. 93—Forms of application—Filing of prospectus—Statement in lieu of Prospectus—Liabilities arising from misstatements, etc in a prospectus—Liabilities arising from untrue statements in a statement in lieu of prospectus—Alteration of prospectus or statement in lieu of prospectus.

### PROSPECTUS

The issue of a prospectus has been regarded as perhaps the most practical and important matter connected with the foundation of a company because it is the means by which the necessary capital to work the company is acquired. It is defined in s. 2 (14) of the Act as any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of a company but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed. The important words are 'offering to the public' and it has been held that to circulate a prospectus only among a small circle of friends of the directors or to the existing members is not an offer to the public. *Lindley v. Wash*, (1928) 2 K. B. 93. But a distribution of 3,000 copies of a prospectus among the

members of certain gas companies was held to be an offer to the public **South of England National Gas, etc., Co.,** (1911) 1 Ch 573.

A company, however may not issue a prospectus, but, in that event s 98 of the Act requires that every company except a private company must issue a statement in lieu of prospectus setting out the particulars mentioned in the form marked 1 in the second Schedule to the Act and it must be signed by the directors or by persons authorized by them in writing. Until that is done, no shares or debentures can be allotted.

## CONTENTS OF A PROSPECTUS

Now S 93 of the Act as amended in 1936 gives, in detail, what should form the contents of a prospectus. As laid down in this section a prospectus must state —

(a) Contents of the memorandum names of its signatories, the number of shares they take the number of founder,' or deferred shares if any and the number of redeemable preference shares intended to be issued with the date and the proposed method of redemption,

(b) the number of shares fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors (the reason being to show how far the directors have a real interest in the company),

(c) the names, descriptions and addresses of the directors and of the managers and managing agents or proposed managing agents, if any and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them,

(d) the minimum subscription on which the directors can proceed to allot shares and the amount payable on application and allotment on each share, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment within the last two years the amount actually allotted and the amount paid on the shares so allotted [the reason being that the business of the company cannot be worked without enough capital. It may be noted here that cls (1) and (2) of the amended s 101 now provide a basis for fixing the minimum subscription which was so determined at the caprice of the promoters often at a ridiculously low figure]

(e) the number of shares and debentures which have been issued within the two preceding years otherwise than for cash and the consideration for which they were issued (the reason being that the intending subscribers may know what has been paid for the property of the company and what for promotion and expenses),



(ee) the names of the underwriters of shares or debentures, if any, and the opinion of the directors that their resources are sufficient to discharge the underwriting obligation (this clause is wholly new);

(f) the names and addresses of the vendors of any property purchased or proposed to be purchased by the company and the amount payable to each of them either in cash, shares or debentures (s. 94 and 95 accord a little extended meaning to the term 'vendor' for the purposes of this clause);

(ff) where the property referred to in cl. (f) has within the last two years been sold, the amount paid by the purchaser for the same, and if such property is a business, the profit thereof during each of the last three years or each year of its existence if less than three years (this clause is entirely, new);

(g) the amount of money paid or payable by the company in underwriting commission on shares or debentures or as discount in respect of shares issued showing separately the amount, if any, so paid to the managing agents [Underwriting of shares is in effect a term of insurance against the risk that the shares shall not be taken up by the public. The underwriter in return for a commission agrees to take up a certain number of the offered shares if and so far as they are not subscribed for by the public. But an agreement by which the underwriter is to subscribe only for such number of shares, if any, as the public may not take up, and the company is to pay up commission in any event is *ultra vires* the company. *Australian Investment Trust, Ltd. v. Strand Properties Ltd.*, (1932) A. C. 755];

(i) the amount of preliminary expenses;

(k) the amount paid within two preceding years to any promoter and the consideration for the same;

(l) the dates of and parties to every material contract including contract relating to the acquisition of property to which cl. (f) applies and the time and place at which such contract could be inspected. [This provision does not apply to a contract made in the ordinary course of business, or the contracts (except a contract appointing or fixing the remuneration of a managing director or a managing agent) made more than two years before the date of the issue of the prospectus];

(m) the names and addresses of the auditors (if any);

(n) the nature and extent of the interest of every director in the promotion of, or the property to be acquired by, the company; or, if his interest as such exists in being a partner in a firm, then the nature and extent of the interest of the firm; also a statement of all sums paid or agreed to be paid to him or the firm in cash or otherwise to induce him to become a director or for any services

rendered by him or the firm in connection with the promotion or formation of the company;

(o) if a company has shares of more than one class, the rights of voting conferred by, and the rights in respect of capital and dividend attached to, these several classes respectively;

(p) where the articles impose any restrictions upon the members in respect of their right to attend, speak or vote at the meeting of the company, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions (this clause is also new); and

(q) where any part of the sums required to fix the minimum subscription under s 101 (1) and (2) is to be provided out of sources other than share capital, the particulars of the amount to be so provided and the sources thereof should be mentioned in the prospectus [this was sub-sec. (1C) under the Amendment Act, 1936 through a mere slip and is now transposed here by the Repealing and Amending Act XX of 1937]

The Amendment Act of 1936, besides adding some particulars to sub-sec (1) as pointed out above, further adds sub-secs. (1A) and (1B). Sub-sec. (1A) provides that where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-sec. (1), namely:—

(i) report by the auditors of the company with respect to the profits of the company in each of the last three financial years or such shorter period for which accounts have been made up, and with respect to the rates and the dividends, if any, paid by the company on each class of its shares during such period giving particulars of each such class of shares and of the cases in which no dividends have been paid on any class made up for any part of that time, and if no accounts have been made up for any part of such period ending on a date three months before the issue of the prospectus, containing a statement of that fact; and

(ii) if the proceeds or any part thereof of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by the accountants named in the prospectus upon the profits of the business during each of the three financial years, or such shorter period during which the business has been carried on, immediately preceding the issue of the prospectus.

Sub-sec. (1B) provides that the statement referred to in cl. (ff) in sub-sec. (1) and the report referred to in sub-sec. (1A) with respect to the profits of a company or business shall clearly show the trading results and all charges and expenses incidental thereto ex-

cluding income or profits having no relation to the trading for the period covered and excluding also items of profits or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation, or reserves.

The aforesaid clauses complete the lists of particulars required to be stated in a prospectus. There are, however, certain exceptions and modifications to these requirements as stated in cls (2) to (4) of s 93.

Under cl (2), where a prospectus is published as an advertisement in a newspaper the contents of the memorandum need not be set up.

Under cl (3) none of the requirements need be set out in a circular or notice to existing members or debenture holders of the company inviting them to subscribe either for shares or debentures of the company.

Under cl (4), the requirements of cls (a) (b) (c) (i) and (n), do not apply if the prospectus is issued more than a year after the date on which the company became entitled to commence business. But no such exemption is available to a prospectus except in respect of cl (n), to be filed by a private company for the purposes of its conversion into a public company under s 154 of the Act.

## PROSPECTUS BY IMPLICATION

On the other hand, under the new section 98A (1) the application of the provisions of s 93 are extended to a document which is not really a prospectus but is deemed to be a prospectus under the circumstances set out in the section. Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company, and all provisions of the Act in regard to a prospectus shall be applicable thereto as if such document was prospectus within the meaning of the Act. Such a document must state, in addition to the particulars required by s 93, (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected [s 98 (3)]. And, where a person making an offer to which this new section relates is a company or firm, it shall be sufficient if the document is signed on behalf of the company or firm by all the directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorized in writing [s 98 (4)].

The question whether an allotment of or an agreement to allot shares or debentures was made with a view to the same being offered for sale to the public would be decided in the affirmative, if, unless the contrary is proved, (i) it is shown that an offer for sale to the public was made within six months after the allotment or agreement to allot, or (ii) at the date of such offer, the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received [s. 98 (2) ]

This whole section is a reproduction of s. 38 of the English Companies' Act, 1929, which was enacted in order to prevent the evasion of ss. 80 and 81 of the English Act of 1908 (ss. 92 and 93 of the Indian Companies' Act, 1913) by allotting the whole of a proposed issue of shares or debentures to some other company or group of persons who would thereupon issue the same to the public. The prospectus in that event would not be issued by or on behalf of the company, and persons issuing the shares or debentures did not incur the responsibilities under these sections.

#### SAVING OF LIABILITY FOR MISSTATEMENTS, ETC.

Now as regards the liability which may be incurred by those responsible for the issue of a prospectus (see *infra*), cl. (5) of s. 93 provides that any liability which any person may incur in respect of statements made in a prospectus under the general law or this Act, apart from that section (93), shall not be limited or diminished by the provisions of that section. In other words, it preserves the liability of directors and other persons to be sued for misstatements in a prospectus under the general law in an action of deceit. S. 93 itself does not impose any penalty for non-compliance with its provisions but it seems that the aggrieved party can sue the directors or persons responsible for the issue of the prospectus for damages for neglect of their statutory duties. *Municipality of Pictou v Geldert*, (1893 A. C. 524.

#### CONDITION TO WAIVE COMPLIANCE WITH S. 93

It may further be noted at this stage that s. 96 of the Act renders void any condition binding any applicant for shares or debentures to waive compliance with any requirements of s. 93 or whereby he is to be affected with notice of any matter which ought to have been, but is not, specifically referred to in the prospectus.

#### FORMS OF APPLICATION

Lastly, it may be noted that it shall not be lawful for a company to issue any form of application for its shares or debentures unless it is issued with the prospectus. This restriction, however, would not apply where it is issued as a *bona fide* invitation to a person to enter into an underwriting agreement or in relation to shares or debentures.

tures not offered to the public. The penalty for contravention of these provisions is Rs. 500 [s. 96 (2) new].

### FILING OF THE PROSPECTUS

Now, where a company prepares a prospectus in pursuance of the aforesaid provisions it must be dated and signed by every person named therein as a director and then, filed with the Registrar on or before the date of its publication and of its being actually issued to the public. Further every prospectus issued must state on the face of it that a copy thereof has been filed with the Registrar for registration. The penalty for issuing a prospectus not duly filed is Rs. 50 a day, as against the company and every person who is knowingly a party to it, from the date of the issue till the copy is filed (s. 92). The object of this provision is, firstly, to keep an authenticated record of the terms and conditions upon which public are invited to buy shares or debentures of the company, and secondly, to secure that the directors of the company accept responsibility for statements made by them in the prospectus.

### STATEMENT IN LIEU OF PROSPECTUS

It is already stated in the earlier part of this lecture that, under s. 98, except in the case of a private company, where no prospectus is issued by a company, a statement in lieu of prospectus must be filed and issued, and that it must contain the particulars set out in the form marked 1 in the second Schedule which are substantially the same as those required to be stated in a prospectus. If no such statement is issued, the company cannot proceed to allot any shares or debentures and, therefore, it would operate as a great obstacle to the company doing anything at all under its memorandum. In the case of a company limited by guarantee and not having a share capital, this section shall not apply in so far as it relates to the allotment of shares.

A difficulty might, however, arise where a statement in lieu of prospectus is issued immediately after the memorandum is prepared and registered. It may not then be possible to give all information required to be set out in the statement, e.g. there may yet be no contract if the company has been formed to acquire property, or there may not be any agreement as to the amount to be paid to the promoter, and statements may be made which ultimately prove to be incorrect or misleading. The question, then, would be whether the company would be prevented from proceeding to allot shares or debentures by reason of such statements, and it has been held in *Re Blair Open Hearth Co. Ltd.*, (1914) 1 Ch. 390 that if a statement in lieu of prospectus has been filed and registered, the company can proceed to allotment notwithstanding that the statement

contains misstatements and omissions. The meaning of s. 98 is that where no prospectus is issued, an applicant for shares shall be able to inspect some document having a similar object, and any applicant who applies for shares on the faith of a filed statement has the same individual right of rescission in the case of misstatement or omission as he would have had if he had relied on a prospectus.

### LIABILITIES ARISING FROM MISSTATEMENTS, ETC. IN A PROSPECTUS

Now comes the consideration of the liabilities of directors and persons responsible for the issue of a prospectus in respect of misstatements contained in a prospectus. Those who issue a prospectus holding out to the public great advantages which will accrue to persons who take up shares on the representations therein contained are bound to state everything with scrupulous accuracy and not only to abstain from stating as facts, that which is not so, but to omit no fact within their knowledge, the existence of which might in any degree affect the nature or extent or equality of the privileges and advantages which the prospectus holds out as inducements to take shares. *New Brunswick Rly Co. v. Muggeridge*, 1 Dr. and Sm. 363. If, in breach of this obligation, a misstatement is made in the prospectus, rights may accrue:—

- (1) to the shareholders as against the company;
- (2) to the shareholders as against the directors and promoters;  
and
- (3) to the company as against the promoters.

#### (1) Company's liability to shareholders

The general principle of law is that a contract to take shares is voidable if it was induced by misrepresentation, whether fraudulent or innocent. Therefore, if there is a material misstatement in a prospectus which induced the shareholder to take shares, he can, if he applies within a reasonable time and before the company goes into liquidation, get his contract rescinded. The result of such a rescission would be that that person would have to give up the shares allotted to him and his name would be removed from the register of the shareholders kept by the company and he would get his money back with interest. This is the only remedy open to a shareholder as against the company. In no event can he retain the shares and claim damages from the company on the ground that the shares are not worth what they were represented to be. A contract to buy shares is not the same as a contract to buy any other chattel. As Lord Cairns explained in *Houldsworth v. City of Glasgow Bank*, 5 A C 323, it is the purchase of a chattel which makes

the shareholder a partner with other shareholders. He becomes a member of the society to the property of which he has agreed to contribute and the property of which, he has agreed, should be used in a particular way and no other. To allow him to retain his shares and get damages would be in effect to allow him to remain a shareholder and yet to withdraw from the company for his own benefit a property which he has agreed should be used for the purposes of the company. In effect, therefore, a claim for damages is really inconsistent with the contract he has entered into as a shareholder and to allow him to retain his shares and get damages would be to allow him at the same time to approbate and reprobate.

The relief of rescission would be available if the following conditions are satisfied

(a) The statement which induced the shareholder to take shares must be one of fact and not merely an expression of opinion or expectation **Karberg's case**, (1892) 3 Ch 1. It was pointed out in this case that if a person states as a fact that he expects to do certain thing but, in fact, has no such expectation, that statement amounts to a misrepresentation of fact

(b) The statement so relied upon must be untrue. One must take the prospectus as a whole and see if it conveys a misleading impression. It is no defence that on analysing the statements separately, a true sense could be made out. **Greenwood Leather Shod Wheel Co.**, (1900) 1 Ch. 421. In this case, the prospectus stated in a large type, "orders have already been received from the House of Commons", and 'wheels for trolleys in the House of Commons have been ordered and are now in use'. In fact, the person who supplied refreshments to the House had one trolley with these wheels, but not ordered by the House of Commons. It was held that the prospectus was fraudulent and the contract void. It must be noted that there must be a positive untrue statement of fact and not merely an omission to state facts unless the omission makes that which is stated substantially a false statement. **Peek v Gurney**, 6 H. L. 377 at p. 403. Further, if a statement was true when it was made but became untrue when the shares were allotted, that would be a good ground for rescission. **Re Scottish Petroleum Co.**, 23 Ch. D. 413.

(c) The statement so relied upon must again be a material one, that is, of such a nature that it would influence the mind of a person who is considering whether to subscribe for shares or not.

(d) The statement in question must have been actually relied upon by the shareholder in applying for shares. **Collins v. Associated Grayhound Race-Courses, Ltd.** (1930) 1 Ch. 1. Generally speaking, the effect of a prospectus is exhausted as soon as the allotment is made and, therefore, persons who buy shares thereafter in

open market cannot sue for rescission on the ground of a false statement in the prospectus. **Peek v Gurney** (*supra*). The principle applies even where a person after buying the shares on the faith of a false statement in the prospectus sells them off before taking any action for rescission or damages and then repurchases them in the market. **Croom's case**, 16 Eq 431. The result would, however, be otherwise if it could be proved that the prospectus was issued with the intention that some persons other than the original allottees should also be induced to buy shares. **Andrews v Mockford**, (1896) 1 Q. B. 372.

(e) Lastly, the shareholder must start proceedings for rescission within a reasonable time and before the company goes into liquidation. It must be remembered that in cases such as these, rights of other persons such as other shareholders and creditors are involved and, therefore, it will not do if a shareholder wants to see if the speculation turns out to be successful or not, and then to elect, according to the event, whether to rescind the contract or not. **Jaganuath Prasad v Official Liquidators**, (1955) All 301.

A prospectus may often be based upon the report of an expert who has examined the property purchased or to be purchased by the company. If such report contains false statements of fact, a shareholder who has relied on them may sue for rescission if the directors have invited subscriptions for shares on the faith of the statements in the report, unless they have clearly warned the public that they do not vouch for the accuracy of the report. **Parava Rubber Co. Ltd.**, (1914) 1 Ch 542.

There may be a case, however, where a person is induced to take shares, not by the statements in a prospectus or a report but by an oral statement of fact made by an authorised agent of the company. In such cases, the shareholder must prove that the alleged statement was false, and was made by a director or an agent of the company while acting within the scope of his authority, or that the company was somehow affected with notice, before the contract was made, that it was in fact been induced by a misrepresentation. **Mair v Rio Grande Rubber Estates**, (1917) A. C. at p 872. A statement by a promoter, however, who subsequently becomes a director, cannot avail for rescission if the contract to take shares has been made on faith of such statement. **Lynde v Anglo-Italian Hemp Co.**, (1896) 1 Ch. 178.

The right to rescind is lost if the shareholder does any act adopting the contract, or if rescission has become impossible because the parties cannot be relegated to their original position, e.g., when the company is being wound up. The right is also lost by laches. In one case, even a lapse of fifteen days after the shareholder became fully informed of the circumstances entitling him to apply for rescission



was held to deprive him of this right. *Scottish Petroleum Co.*, (1893) 23 Ch. D. 413 at p. 434.

## **(2) Directors' and promoters' liability to shareholders**

The liability of a director and every other person who has authorised the issue of a prospectus for misstatements or omissions therein arises in three different ways, namely:—

- (i) under s. 97 of the Act;
- (ii) under s. 100 of the Act; and
- (iii) in an action of deceit under the general law

### **(i) Under s. 97**

Prior to the amendment of this section in 1936, neither did it define the nature of the liability incurred by persons responsible for the issue of a prospectus nor provide any means for enforcing such liability. The Amendment Act has now added a sub-section whereby it is provided that every person who is knowingly responsible for the issue of a prospectus which does not comply with the provisions of s. 93 shall be liable to a fine not exceeding Rs. 50 for every day from the day of the issue until a copy complying with the requirements of s. 93 is filed. It may be noted, however, that this penalty is only provided to compel observance of the requirements of s. 93 and the section as amended does not even now provide for the liability arising from such non-compliance in favour of the person who applies for shares on the faith of such incomplete prospectus. Sub-section (2) of s. 97 which, prior to the amendment, figured as sub-sec. (1) provides that (a) a director or any other person responsible for the prospectus does not incur any liability towards anybody if he can prove that (i) as regards any matter not disclosed in the prospectus, he was non-cognisant thereof, or (ii) the non-compliance or the contravention arose from an honest mistake of fact on his part, or (iii) was in respect of matters which, in the opinion of the Court, were immaterial or was otherwise such as ought, in the opinion of the Court, having regard to all the circumstances of the case, reasonably to be excused, and (b) where the liability is alleged to arise out of non-compliance with or contravention of cl. (n) of s. 93, he shall not incur any liability unless it is proved that he had knowledge of the matters not disclosed. In the first case, the burden of proof is on the person alleged to be liable whereas, in the latter, it is on the person alleging the liability. The question, however, as to the nature of the liability in favour of persons subscribing for shares on the faith of an incomplete prospectus remains unanswered. It has, however, been held that, by implication, a shareholder who has taken shares on the faith of such prospectus and has been aggrieved by the neglect of the statutory duty on the part of the persons responsible for it is entitled to sue them in damages though he cannot sue for

rescission of his contract or apply to have his name removed from the register. *Wimbledon Olympia, Ltd.*, (1910) 1 Ch. 630; *South of England Gas Co.*, (1911) 1 Ch. 573.

## (ii) Under s. 100

While s. 97 deals with cases of non-compliance with or contravention of the provisions of s. 93, s. 100 deals with cases of misstatements of facts in a prospectus. Every director, promoter and every other person who authorises the issue of such a prospectus incurs liability towards those who subscribe for shares on the faith of such misleading or untrue statements, and this liability consists in paying damages to the aggrieved shareholder. It is immaterial for the purpose of this section whether the director sees the prospectus or not; it is enough that he authorises its issue. *Shanmugam v Ranga*, AIR (1934) Mad 641

The liability under this section, however, is open to several defences which may be pleaded by the person sought to be made liable. He may say either:—

(i) that although he consented to become a director, he withdrew his consent before the prospectus was issued and that it was issued without his authority and consent; or

(ii) that the prospectus was issued without his knowledge and consent and that on becoming aware of its issue, he promptly gave a public notice to that effect; or

(iii) that, after the issue of the prospectus and before the allotment, he, on becoming aware of misstatements, withdrew his consent thereto and gave a public notice of his withdrawal and the reason therefor.

Besides these defences on the question of consent to issue the prospectus as set out in clauses (i) to (iii) of s. 100 (1), there are others with regard to the misleading or untrue statements themselves as provided in clauses (a) to (c) to the same sub-section. He may say either:—

(a) that he had reasonable grounds to believe the statement to be true, and that he had, in fact, believed it to be true. [*Manavedan v. Amirchand*, A. I. R. (1944) Mad. 431]; or

(b) that the statement, if made on the authority of an expert, was in fact made on the authority of such expert and fairly represented his opinion; or

(c) that the statement, if it is an extract or a copy of an official document or made by an official person, was a correct and fair copy of the document or representation of the statement, as the case may be.

If any of these defences is raised, it must be proved to the hilt. The onus at first lies upon the shareholder plaintiff to prove that a

particular statement in the prospectus is a misleading or untrue statement and that he subscribed for shares on the faith of such a statement. The burden then shifts on to the defendant to prove whichever of the above-stated defences he raises in his written statement.

The section goes on further to provide by sub-sec. (3) a remedy as between a director who may be made liable under the foregoing provisions of the section on one hand and other directors and persons who authorised the issue of the prospectus on the other. If a person is named as a director in a prospectus but has not consented, or has withdrawn his consent, to be a director and the prospectus is issued without his authority or consent, he is entitled to be indemnified by the other directors and persons with whose knowledge and consent the prospectus is issued, against all damages, costs and expenses for which he may be made liable by reason of his being named as a director in the prospectus or which may be incurred in defending himself in any legal proceedings that may be brought against him in respect of a misstatement in the prospectus.

Secondly, under sub-sec. (4), a director who is ordered to pay any damages under the section has a right of contribution, as against other directors and all other persons who would themselves be liable to pay them were the proceedings instituted against them. An exception, however, is made where such a director is personally guilty of any fraudulent misrepresentation which, of course, cannot, under the general law, bind the other directors and persons as aforesaid.

### (iii) Under the general law

Besides the liability under s. 100, there is another liability under the general law under which a shareholder can seek to hold all or any of the persons responsible for the prospectus liable in an action of deceit. This remedy is open even where the remedy by way of rescission as against the company is lost either through laches or negligence or even if the company goes into liquidation. It was pointed out in *Derry v. Peek*, 14 A.C. 337, that in order to succeed in an action of deceit, the plaintiff must prove not only that he was actually deceived by reason of his having acted on the faith of the misrepresentation contained in the prospectus but he must also prove actual fraud on the part of the defendant. Mere misreading of a prospectus cannot form the basis of such an action. *Bansidhar v. The Tata Power Co., Ltd.*, 27 Bom L. R. 330.

### Summary

Summarising the liabilities of directors and other persons who authorise the issue of a prospectus, they may be classified as follows:

(i) in damages for non-compliance with or contravention of the provisions of s. 93, as a result of neglect of statutory duty;

(ii) for compensation under s. 100 for misstatements, fraudulent or innocent, contained in the prospectus; and

(iii) in damages under the general law in an action of deceit for fraudulent misstatements contained in the prospectus.

### (3) Liability of promoters to the company

This question is already dealt with in the preceding lecture and it will be enough to mention at this stage that where sufficient disclosures are not made by a promoter to the company as a whole and to the public through a prospectus as regards his previous contracts, the company is entitled to set them aside. Where, however, the position of the parties has changed, and they cannot be relegated to their original position and, consequently, rescission is not possible, the company can sue the promoter for damages sustained by it by reason of such insufficient disclosures provided that such disclosures were fraudulent but if they were not so, there would be no other remedy open to the company. *Re Lady Forrest Gold Mines Ltd.*, 1901) 1 Ch 582

### LIABILITIES ARISING FROM UNTRUE STATEMENTS IN A STATEMENT IN LIEU OF PROSPECTUS

In this connection the Act is utterly silent. It seems, however, that a person buying shares on the faith of a misleading or untrue statement contained in a statement in lieu of prospectus would be entitled to sue the company for rescission, but he would not be entitled to compensation under s. 100 of the Act. It further seems that he would be entitled to damages firstly, for neglect of statutory duty in case of non-compliance with or contravention of the provisions of s. 98 and Form I in the second Schedule and, secondly, in an action of deceit for having acted on the faith of a misleading or untrue statement contained in the statement in lieu of prospectus under the general law.

### CRIMINAL LIABILITY

In addition to the civil liabilities of persons responsible for the issue of a prospectus or a statement in lieu of prospectus, s. 282 of the Act imposes a criminal liability on them where they wilfully make a false statement in the prospectus or the statement in lieu of prospectus and provides a punishment of imprisonment of either description which may extend to two years and also of fine.

### ALTERATION OF PROSPECTUS OR STATEMENT IN LIEU OF PROSPECTUS

Lastly, it may be noted that a company is not entitled to vary the terms of any contract referred to in the prospectus or the statement in lieu of prospectus unless the proposed alteration is approved of by the company in a general meeting (s. 99). And even where a

prospectus is duly altered in material particulars, but before the date of the allotment of the company's shares, a person who has applied for shares in the company on the basis of the prospectus issued on its behalf and before its alteration is entitled to revoke his application for shares. *Rajagopala Iyer v. The South India Rubber Works, Ltd.*, I. L. R. (1943) Mad. 133; *Anderson's case*, 17 Ch. D. 373.

## LECTURE VI

### SHAREHOLDERS

*How to be a Shareholder—Who can be a Shareholder—How to cease to be a Member—Liability of members—Register of members—British Register—Index of members—Inspection and Copies of the Register and Index—Rectification of Register—Annual List of members and Summary*

#### HOW TO BE A SHAREHOLDER?

A person may become a shareholder or a member of a company in any one of the five following ways.—

- (1) by subscribing the memorandum before its registration,
- (2) by agreeing with the company to take a share or shares and being placed on the register of members;
- (3) by taking the transfer of a share or shares and being placed on the register,
- (4) by registration on succession to a deceased or bankrupt member; and
- (5) by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member. *Collector of Moradabad v Equity Insurance Co*; A.I.R. (1948) Oudh 197.

The first two of these are provided by s. 30 of the Act. The third is only the legal consequence of the exercise of the right to transfer shares conferred by s. 28 (1) of the Act on every member of the company. The fourth is also a legal consequence of the laws of succession and insolvency as applied to a member of a company, as the case may be, and the fifth is the result of the application of the doctrine of acquiescence and estoppel.

#### (1) Membership by subscription

As regards (1), it will be remembered that a memorandum of association contains a subscription clause and the persons desirous to be formed into a company subscribe their names to the memorandum with their addresses, descriptions and the number of shares

each one of them has agreed to take. All these persons under the first clause of s. 30 are deemed to be members of the company only by reason of their having signed the memorandum. *U. P. Oil Mills v. Jamna Prasad*, 55 All. 417. Their names are entered on the register of members after the company is incorporated but neither allotment nor registration of their names is necessary to make them members of the company. *Collector of Moradabad v. Equity Insurance Co.*, (*supra*) The only condition, if at all it could be called a condition, is that the company should be incorporated and, on incorporation, all the subscribers to the memorandum become its members without the need of doing anything further at all.

It should be noted that by subscribing the memorandum, every one of the subscribers is deemed to have contracted to become a shareholder in respect of the shares he has subscribed for. He must take the shares direct from the company and pay calls duly made on them like any other shareholder. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 63. One subscriber cannot transfer his shares to another subscriber and so on because the same shares cannot be made to do a double duty. Each one must take his shares from the company unless all the shares have already been taken up. *Tuffnell's case*, 29 Ch. D. 421; *Mackley's case*, 1 Ch. D. 274.

The nature of a contract to be a member by a person who signs the memorandum is a peculiar one. In *re Metal Constituents Ltd.* (Lord Lurgon's case), (1892) 3 Ch. 555. In this case L agreed to take 250 shares and signed the memorandum. Later on, he sought to rescind the contract on the ground that he was induced to sign the memorandum by the misrepresentation of the promoter of the company. It was held that, even if it were so, he was not entitled to rescind the contract because the promoter was not and could not be the agent of the company which was, then, non-existent. It was further argued in this case that the company ought not to retain the benefit of such contract, and it was held that this principle could not apply because the contract in the case was not merely a contract between the subscribers and the company but it was a contract which was the basis of the corporation as one of the contracting parties, and all persons who in future became members of the company would do so on the assumption that such a contract existed. Similarly, a subscriber to the memorandum is liable to pay for his shares in cash even if he had entered into an arrangement with the promoter of the company under which he was to receive the shares for his legal services rendered in connection with the promotion of the company. *Kanduri Chetty v. Adoni Electric Supply Co. Ltd.*, A. I. R. (1944) Mad. 322. For the same reasons, a signatory to a memorandum cannot revoke, even before registration of the company, his contract to take shares specified against his name in the memorandum by asking the promoter to cancel his shares. *Machine*

**Exchange Co. Ltd, In re, 12 Bom 311, Chandler & Co. v Phillips, 48 All 580, Banwarilal v Kundan Cloth Mills, Ltd, 1 L R (1937) Lah 294**

### (1) Membership by application

As regards (2) a person must send in an application for such number of shares as he desires to have or as the company might allot to him. The application is regarded as an offer from the applicant and it is to be accepted by the company. The acceptance if made, should be communicated to the applicant by giving him a notice of allotment **Pellat's case** 2 Ch App 527) and as in the case of any other contract the applicant has a right to revoke his application before the notice of allotment is put in course of transmission to him e.g. by post. **MacLagan's case** (1882) 51 L J Ch 841. Mere handing of the notice of allotment to a postman however does not amount to posting it. **Re London & Northern Bank Ex parte Jones, (1900) 1 Ch 220**. Thus an application for shares to the company and a notice of allotment to the applicant by the company would result in a complete agreement entitling the allottee to the membership of the company.

This however is not all. There is another condition mentioned in s 30 which must be complied with before an applicant actually becomes a member. By an agreement to take shares an applicant only agrees to become a member but he does not become a member until his name is entered on the register of members. **Nicol's case, 29 Ch D 421**. In this case A had agreed to take certain shares but his name had not been entered on the register of members nor had any allotment moneys been paid nor any certificate of shares issued. When after some years a winding up order was made and A was sought to be made liable as a contributory by getting the register rectified, it was held that he had never become a member of the company but had only agreed to be a member and therefore, the register could not be rectified.

In such cases however a person who has agreed to become a member can sue the company for specific performance of the agreement to make him a member or under s 38 of the Act the aggrieved person or any other member of the company may apply to the Court to rectify the register of members so as to put the name of such person on the register provided the omission to do it was due to some insufficient reason or fraud. So long as either of these remedies is not adopted such a person does not become a member of the company and, therefore not liable on the shares that may have been allotted to him. The register can also be rectified in winding up proceedings under s 184 for any of the reasons mentioned in s 38 as set out above, if the agreement is one which at the commence-

ment of the winding-up, the company was entitled to have specifically enforced and, if so rectified, he would be liable as a contributory. **Arnot's case**, 36 Ch. D. 702.

There may be a case, however, where a person's name appears on the register of members, although he has not, in fact, agreed to be a member. In such cases, too, the remedy is to apply to the Court to rectify the register under the same section on the ground that the name is entered therein without sufficient reason or fraudulently and that he is not a member [**Omerod's case**, (1894) 2 Ch. 475], or the aggrieved party may file a suit for the purpose. If the register is not rectified and the name remains on the register with full knowledge and assent of the alleged member, a decision of the Privy Council in **Hansraj v. Asthana**, 35 Bom. L. R. 312 lays down that, in case of winding up of the company, he will be liable as a contributory. This case must be distinguished from a case where the name may appear on the register of members to the knowledge but not with the assent of the alleged member. In such a case, although no proceedings have been taken by such person to get his name removed from the register and, in case of winding up of the company, he is sought to be made liable as a contributory, he is entitled to contend that he has never agreed to be a member at all. Under s. 40 of the Act, the register of members is a *prima facie* but not conclusive evidence of matters contained therein. **Reese River & Co. v. Smith**, L. R. 4 H. L. 8. It is, therefore, open to a person who has never agreed to be a member to prove that fact in any proceeding in which he is sought to be made liable as a member on the strength of the entry of his name in the register of members. **Bakshish Singh v. Khalsa Bank Ltd.**, A. I. R. (1933) Lah. 1016 (2). But a person whose name stands and has been for over a year in the register of the company cannot, after the commencement of the winding up proceedings of the company, dispute his liability as a contributory on the ground that he became a member of the company under an instrument of transfer which was not properly stamped and in consequence could not be admitted in evidence or acted upon. **Yamuna Das v. Bihar Engineers** A. I. R. (1944) Pat. 226.

Now, an application for shares may be simple or conditional. If simple, a simple allotment with the notice thereof to the applicant will complete the agreement. If conditional, the allotment must be made on the basis of the conditions specified. In **re Universal Banking Co.** **Roger's case**; **Harrison's case**, (1868) 3 Ch. App. 633. In the first case, R. wanted to be appointed local manager of a company. He was told he would have to take 100 shares. He applied for the shares but was not appointed. Then he was allotted the shares but refused to take them and revoked his application. It was held that



R was not a member as his application was conditional and the allotment was unconditional. It was also held that it was not necessary for him to revoke the application. It was further held that the condition need not be mentioned in the application itself; it may be written out separately, provided both the application and the condition reach the directors together. While in the second case, though the facts were similar to **Roger's case**, H did not call the agent, with whom he had a talk about the appointment and who had written out the condition on a separate paper and sent it with the application to the directors, in evidence to show that the application and condition were sent together by the agent, and it was, therefore, held that as the application was unconditional and the allotment was also unconditional, he was a member of the company.

The rule laid down in **Roger's case** that the condition and application must reach the directors *together* was departed from in a **Bombay case**. **Ramanbhai v Ghasiram**, 42 Bom 595. There, the application was in the usual form of the company but the applicant had a talk with the company's agent about his being appointed a manager in a branch office of the company in the first instance. This condition was not communicated to the directors along with the application and the shares were allotted to the applicant. The correspondence which passed between the directors and the applicant, however, was produced in Court and it appeared therefrom that the directors did know about the condition. It was, therefore, held that the applicant did not intend to be a member of the company *in presenti*.

There are three kinds of conditions—a condition precedent, a collateral condition and a condition subsequent. If the application is made subject to a condition precedent as in **Ramanbhai's case**, then, although the company accepts the condition and allots the shares, the applicant does not become a member so long as the condition is not fulfilled. If, on the other hand, the case is of either of the two other conditions, the applicant does become a member on the company sending to him the notice of allotment and placing his name on the register of members. In the event of the company being wound up, he cannot escape the liability as a contributory although the condition has not been complied with by the company before that time. He may be entitled to damages against the company for its failure in carrying out the condition. **Elkington's case** (1867) 2 Ch. App. 511; **Fisher's case**, (1885) 31 Ch. D. 120. But as the liability of a contributory arises *ex lege* and not *ex contractu*, the non-fulfilment of the condition cannot permit him to contend against his statutory liability as a contributory which is the direct result of his being a member of the company. **Hansraj's case** (*supra*).

### (3) Membership by transfer

As regards the third mode of becoming a shareholder, shares are made freely transferable by s. 28 (1) of the Act, but the mode of transfer is left to be decided by the articles of the company. Accordingly, it is but natural that a person taking a transfer of shares becomes entitled to be placed on the register of members in place of the transferor in respect of the shares so transferred.

### (4) Membership by succession

As regards (4) a person may become a shareholder by registration if he succeeds to the estate of a deceased shareholder. The official assignee likewise is entitled to be a member in place of a shareholder who is adjudicated insolvent. It may be noted that transfer and transmission of shares in a company are quite distinct from each other. The former is based upon the act of the parties; the latter is the result of the operation of law. In the case of transmission of shares, they continue to be subject to original liabilities; and if there was any lien on the shares for any sum due to the company, the same would subsist, notwithstanding the devolution of the shares. *Thenappa v. Indian Overseas Bank*, A. I. R. (1943) Mad. 743.

### (5) Membership by acquiescence

As regards the fifth and the last mode, it has been held by some legal authorities, probably on principles of equity, that a person may be deemed to be a member of a company if he allows his name, apart from any agreement to become a member, to be on the register of members or otherwise holds himself out or allows himself to be held out as a member. The liability arises from his assent to remain on the register even in a case where his name has been improperly entered therein; it also arises in a case where he is estopped from denying that he is registered with his consent. *Hansraj's case* is an apt illustration on the question of assent.

### WHO CAN BE A SHAREHOLDER?

The Act does not prescribe any disqualification for any person which would debar him from becoming a member of a company. It seems, however, that as the membership involves an agreement to become a member which is specifically enforceable in a Court of law (*Brunswick etc. Rly. Co. v. Muggeridge*, 1 Dr. & Sm. 363; *Odessa Tramways Co. v. Mendel*, 8 Ch. 235), the provisions of the Indian Contract Act, 1872, regarding the persons who can contract would be applicable. If so, a minor or a lunatic cannot make an agreement to be a member of the company. Under the English law, a minor's contract, unlike the Indian law, is not void but only voidable subject to his right of repudiation on attainment of majority. Until it is disaffirmed, it is a valid contract. *Capper's case*, 3 Ch. App. 458. In

India, a minor is wholly incompetent to make any contract **Mohori Bibi v. Dharmodas**, (1903) 30 Cal 539 (P. C.) Consequently, where application is made by the father as guardian of his minor daughter and the company issues shares to and registers shares in the name of the minor describing her as a minor the transaction is void on the face of it and the father of the minor who signed the application cannot be deemed to have contracted for the shares and cannot be placed on the list of contributories in the event of a company being wound up **Palaniappa v Official Liquidator**, A I R (1942) Mad 470.

If, however, directors in ignorance of the fact of minority, allot shares to a minor in response to his application, and enter his name on the register of members the company can repudiate the allotment and remove his name from the register when the fact of the applicant's minority comes to its knowledge. The minor can also repudiate the allotment at any time during his minority. In either case, the company must repay to the minor all moneys received from him in respect of the allotted shares. And whether or not the minor should restore to the company the benefits he might have derived from the shares would be for the Court to decide in view of the facts and circumstances of each case.

There is, however, a change of position after the minor attains majority. He can still repudiate his liability on the shares on the ground of minority and the company cannot plead an estoppel on the ground of his having received dividend during his minority or that he had fraudulently misrepresented his age in his application for shares. **Sadiq Ali v Jai Kishori**, 30 Bom L R 1346 (P C), **Balangowda v Gadigeppa**, 31 Bom L R 340. If, on the other hand, he received dividends after attaining majority thereby intentionally permitting the company to believe him to be a shareholder and in that belief to pay him dividends since he attained majority, he would be estopped by his conduct while being a person *sui juris* from denying as between himself and the company that he is a shareholder. **Fazalbhoy v The Credit Bank of India Ltd.**, 39 Bom 331.

Further, a company can also become a member of another company if it is so authorised by its memorandum, or if it takes shares in payment of a debt by way of a compromise.

Next, a person who lends money to a company on a mortgage of its shares may become liable as a member in respect of those shares although the company repays the loan and gets the mortgaged shares transferred to its nominee, the reason being that company cannot have any power to take back its own shares. **Addison's case**, 5 Ch App 294. Similarly, a person who takes shares in the name of a fictitious person would also become liable as a member. **Re Klondyke Gold Co.**, (1809) W N I.

### Trustees as shareholders

S. 33 of the Act says that no notice of any trust, express, implied or constructive, shall be entered on the register, or be receivable by the Registrar. Accordingly, if the trustees transfer shares to a person other than one for whom they are held on trust and the transfer is registered, the company will not be liable to the beneficiaries thereof. *Simpson v. Molson's Bank*, (1895) A. C. 270. The decision goes to the length of holding that even if the company has a constructive notice of the trust in respect of such shares, it would not in any way make the company liable.

By these provisions, however, trusts of shares are not intended to be discouraged. The effect of the trust will only be that the trustee's name will be entered on the register as a shareholder and he will be liable as such for calls even though the amount payable on them exceeds the value of the trust property in his hands, and he, in turn, will be entitled to be indemnified by the beneficiary as the person ultimately liable for the calls. *Hardoon v. Belillos*, (1901) A C 118.

Similarly, an executor of a deceased shareholder is liable when he is put on the register in place of such deceased member and he is entitled to be indemnified from the deceased's estate. Where no executor is appointed the estate is liable to the company for calls. In either event, the estate is ultimately liable to the company. *Re T. H. Saunders & Co. Ltd.*, (1908) 1 Ch 415. Likewise, a company is entitled to claim call money from the wife alone whose name is entered in the register of members maintained by it although she may only be a benamidar for her husband in respect of the shares for which the call money is due. *Murshidabad Loan Office, Ltd. v. Satish Chandra*, A I R. (1943) Cal. 440.

### HOW TO CEASE TO BE A MEMBER?

A person may cease to be a member in one of the following ways:—

- (1) by transferring his shares (but he would be liable to be put on the 'B' list of contributors for one year as a past member);
- (2) by forfeiture of his shares;
- (3) by a valid surrender of his shares;
- (4) by a sale by the company in exercise of its lien over his shares.
- (5) by his death (the shares would be transmitted to his personal representative);
- (6) in case of his insolvency, on a disclaimer by the Official Assignee of his estate;
- (7) on winding up of the company (he ceases to be a member but remains liable as a contributory and is also entitled to his share in the surplus assets, if any); and

(8) on rescission of the contract of membership on the ground of misrepresentation or mistake (not applicable to subscribers of the memorandum).

### LIABILITY OF MEMBERS

In the absence of an express agreement to the contrary, a shareholder must pay the whole nominal amount of his shares in cash. 'Cash' here does not necessarily mean in terms of the current coin of the country. It means 'such a transaction as would, in an action at law for calls, support a plea of payment.' *Larocque v. Beuchemin*, (1897) A. C. 358. The company in this case agreed to buy a paper mill for £35,000 in cash. The vendors agreed to take 50,000 shares in the company and paid for some of them in cash, but the rest were paid for by the company retaining part of £35,000 which it had to pay to the vendors for the mill. It was held that the whole 50,000 shares had been paid for in cash. It must be noted that there was first an agreement to sell the mill for cash and a later independent agreement to take shares. Therefore, as Lord Macnaughten observed,

'If a transaction resulted in this, that there was on one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it appears to me that the Act does not make it necessary that the formality should be gone through of the money being handed over and taken back again.'

§ The liability to pay the whole amount on shares is not discharged until it is actually paid up, and it may be paid from time to time as and when the company makes calls on the shareholders. If, at any time before the full amount is paid up, the company goes into liquidation, the shareholder becomes liable as a contributory to pay up the balance to the Official Liquidator when called upon [s. 159 (1)]

If, on the other hand, a person has ceased to be a member within one year prior to the winding up of the company and the full amount due on his shares has not been paid up, he is liable to be included in the 'B' list (of past members) and to pay, on the shares which he held, to the extent of the amount unpaid thereon, if—

(i) on the winding-up, debts exist which were incurred while he was a member; and

(ii) the members of the 'A' list (which is the list of present members) cannot satisfy the contribution required from them in respect of their shares (s. 156).

### REGISTER OF MEMBERS

S. 31 of the Act makes it obligatory upon every company to maintain a register of its members. It must contain the names,

descriptions and addresses of the members the amount and number of their shares, the date of acquiring them, the amounts paid on them and the date when a member ceased to be as such. In case of default, the company and every officer of the company who permits or authorises such default are each liable to a fine of Rs. 50 for every day during which the default continues.

Under s. 40, a register is *prima facie* evidence of matters directed or authorised by the Act to be inserted therein. This point has been dealt with a little earlier in this lecture.

### BRITISH REGISTER

The register above referred to is one to be maintained by the company in British India. Where however a company having a share capital is authorised by its articles to keep a branch register of members in the United Kingdom such register under the Act is called a British Register. The company must within one month from the date of the opening of any such register file with the Registrar notice of the situation of the office where such register is kept. In the event of any change in the situation of such office or of its discontinuance it must notify the same to the Registrar within one month from the date thereof. In case of default it shall be liable to a fine not exceeding Rs. 50 for every day of such default (s. 41).

Under s. 42 a British Register shall be deemed to be a part of the company's register above referred to which may be called the principal register. It should be maintained in the same manner as the latter except that the advertisement before closing it should be inserted in some newspaper circulating in the locality wherein it is kept. A duplicate copy of such register should be maintained at the head office in British India and all entries made in the British Register should be entered in the duplicate register as soon as possible. The shares registered in the British Register should be distinguished from shares entered in the principal register and no transactions with regard to the shares in the former should be entered in the latter but only in the duplicate register. The company may at any time discontinue such British Register in which case all entries made therein should be transferred to the principal register.

### INDEX OF MEMBERS

The Amendment Act of 1936 adds a new section 31A on the lines of s. 96 of the English Companies Act, 1929. It requires every company having more than fifty members to keep, unless the register is in such a form as to constitute in itself an index, an index of the names of its members with a further obligation, in case of any alteration in the register, to make the necessary alteration in the index within fourteen days. The index may be in the form of a card index but it must contain a sufficient indication to enable the account of

each of its members in the register to be readily found. The section also provides a penalty for default in complying with its provisions both by the company and its officers to the extent of Rs. 500.

### INSPECTION AND COPIES OF THE REGISTER AND INDEX

S. 36 of the Act entitles every member of a company to have a free inspection of the register and index while an outsider can have it on payment of a rupee or such less fee as the company may prescribe during business hours of every working day except when, in the case of the former, it is closed under s. 37 (which authorises the company to close it on giving seven days' previous notice by advertisement in some local newspaper for any time or times not exceeding 45 days in each year but not exceeding 30 days at a time). Any such member or outsider may also make extracts therefrom if he so chooses. Any person can also have a copy thereof or of the list and summary required to be kept under the Act (*infra*) on payment at the rate of six annas for every hundred words and, by the recent amendment, the company is obliged to send such copy to the applicant within ten days from the date on which the requirement is received by the Company. The company can in no event refuse to give inspection or fail to supply copies in proper time. If it does, the company as well as every officer who permits or authorises such refusal or failure is liable to be fined Rs. 20 for the offence and further Rs. 20 a day. Besides, the Court may compel an immediate inspection of the register or direct the copies to be sent.

### RECTIFICATION OF REGISTER

The circumstances under which a register may be rectified have been already mentioned in an earlier part of this lecture. S. 38 of the Act provides that the Court can rectify a register in two cases while the company is a going concern: (1) where the name of a person is fraudulently or without sufficient cause entered in or omitted from the register, and (2) where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company.

The Court is also empowered to rectify a register on the winding up of a company before settling the list of contributories (s. 184). Where, however, the register is rectified after the list has been settled, the Court may re-settle the list. **Onward Building Society**, (1891) 2 Q. B. 463.

The provisions of both these sections (38 and 184) are not exhaustive and do not prevent the Court from altering the register in cases other than those specified. For instance, the Court may rectify a register to enable joint-holders of shares to exercise their joint rights as members by altering the order in which they are registered. **Burns v. Siemen Bros.' Dynamo Works**. (1919) 1 Ch. 225. Besides, it

must be noted that the remedy provided in s. 38 by a petition to the Court is a summary one and does not deprive an aggrieved party of his right to proceed by a suit for rectification of the register. *Reese River & Co. v. Smith*, L. R. 4 H. L. 80.

Now, the Court in all such cases has a full discretion. It may either refuse or order the rectification of the register and payment by the company of any damages sustained by the party aggrieved and may make such order as to costs as it may think proper. The Court may, if necessary, also decide any question of title to any shares, whether such question arises between members or alleged members or between them and the company and generally any question necessary or expedient to be determined for rectification of the register. It may also direct any issue of law to be tried, if such is raised, and in that case there will be a right of appeal as in an ordinary case under s. 100 of the Civil Procedure Code (s. 38, cls. 2 & 3).

Where a register is directed to be rectified, the Court shall order, if the company is by law required to file a list of members with the Registrar, that the rectification be notified to the Registrar within a fortnight of the completion of the order (s. 39).

#### ANNUAL LIST OF MEMBERS AND SUMMARY

Every company having a share capital is further required, under s. 32 of the Act, to prepare in a separate part of the register of members a list of members within 18 months from its incorporation and thereafter every year showing the number of members at the date of the annual general meeting and of those who ceased to be members since the date of the last annual return or (in the case of the first return) of the incorporation of the company. It must also contain the following particulars:—

(1) the name, address and occupation of each member, both past and present;

(2) the number of shares held by each existing member at the date of the return;

(3) the shares transferred since the date of the last return or from the date of incorporation by past and existing members together with the dates of registration of their transfers;

(4) a summary distinguishing between shares offered for cash and those issued as fully or partly paid up otherwise than in cash and stating: (a) the amount of share capital and the shares into which it is divided; (b) the number of shares taken since the commencement of the company; (c) the amount called up on each share; (d) total amount of calls received and unpaid; (e) the amount of underwriting commission paid since the last return or so much thereof as has not been written off at the date of the return; (f) total number of shares forfeited; (g) total amount of shares or stock for



which share-warrants are outstanding at the date of the return; (h) the number of share-warrants issued and surrendered since the last return; (i) the number of shares or amount of stock comprised in each share-warrant; (j) the names and addresses of the directors and managers or managing agents of the company, and the changes in the personnel of any or all of them since the last return together with the date on which they took place; and (k) the total amount of debts secured by mortgages and charges.

The company must complete this list and the summary within 21 days of the annual general meeting in the year, and forthwith file a copy thereof with the Registrar duly signed by the director, manager and secretary of the company. Such copy should be accompanied by a certificate signed by the officer signing the copy stating that the facts therein stated are correct. In case of a private company, the certificate must (further) state that the company has not issued any invitation to the public to subscribe for any shares or debentures at any time during the period covered by the return and where the return shows more than 50 members, it must also state that the excess consists wholly of persons in the employment of the company. In case of default the company and officers party thereto are liable to a fine not exceeding Rs. 50 per day.

Along with this Annual List and the Summary, copies of the last balance sheet and the auditor's report have also to be filed with the Registrar under s 134 of the Act. This provision, however, does not apply to a private company.

## LECTURE VII

### CAPITAL

*Nature of Capital—Kinds of Capital—Reserve Capital—Alteration of capital—Increase, Consolidation, etc. of capital—Reduction of capital—Re-organization of capital—Variation of shareholders' rights—Stock.*

#### NATURE OF CAPITAL.

'Capital' usually means a particular amount of money with which a business is started but, in the company law, this word is used in the following different senses:—

(1) **Nominal or authorised capital.** It means the nominal value of the shares which a company is authorised to issue by its memorandum. This kind of capital must be stated in the memorandum and also each year in the annual summary.

(2) **Issued or subscribed capital.** It is nominal value of the shares actually issued and subscribed for.

(3) **Paid-up capital.** It means the amount paid up or credited as paid up on the shares issued.

(4) **Capital assets.** They are actual property of a company.

A company may not need all the capital as fixed in the memorandum at once. Therefore, the promoters make provisions in the articles of the company as to how much should be paid on each share on application and allotment reserving the right of the company to call for further amount whenever required. The maximum a person is liable to pay on each share is the nominal amount thereof, when the company is limited by shares. The articles usually contain provisions regulating the manner in which the calls may be made.

S. 101 (3) of the Act, however, provides that the amount payable on every application for shares must not be less than 5 per cent of the nominal value of each share. Then, if the minimum subscription fixed by the articles is reached, the directors may proceed to allot the shares to applicants. On allotment, a further sum of money may be asked for, and the remaining amount on each share may be called for at any time by the directors either wholly or in different sums in the manner, if any, provided by the articles.

## KINDS OF CAPITAL

Now, the capital of a company and its division into shares of a fixed amount are required to be stated in the memorandum. Shares, however, are of various classes. Whenever the company's capital is divided into different classes of shares, provisions to that effect are usually made in the articles. Different classes of shares may have different rights attached to them. But a power in this behalf must be specifically given in the memorandum or the articles of association. If no such power is given, the company can give itself power to do so by altering its articles. *Andrews v. Gas Metre Co.*, (1897) 1 Ch 361. Where, however, shares are divided into different classes with different rights attached to them by the memorandum, the rights so attached cannot be altered unless the alteration is authorised by a clause in the same document providing for their alteration, or effected by virtue of a scheme of arrangement sanctioned by the Court under s. 153 of the Act. *Welsbach Light Co.*, (1904) 1 Ch. 87. No such difficulty would arise where they are defined and attached by the articles.

Shares are of four classes: (1) preference, (2) ordinary, (3) deferred, and (4) redeemable preference shares.

### (1) Preference shares

A holder of preference shares is usually entitled to a fixed dividend before any dividend is paid on the ordinary shares. If it is so,

he is not entitled to more than the dividend fixed by the articles, however prosperous the company may be. But the articles may contain provisions conferring additional rights on the holders of preference shares, e.g. to participate in surplus profits. *Will v. United Lankat Plantation Co.*, (1914) A.C. 11.

Further, preference shares may be either 'cumulative' or 'non-cumulative'. In case of 'cumulative' preference shares, if the profits of the company in any year are not enough to pay the dividend on such shares, the deficiency must be made up out of the profits of subsequent years, while in the other case, the dividend is only payable out of the net profits of each year. When preference shares are not described in the articles as being of either kind the usual presumption is that they are cumulative, and this presumption can be rebutted only if the contrary is provided by the articles in unambiguous terms. *Foster v. Coles*, (1906) W. N. 107; *Staples v Eastman Photo Co.*, (1896) 2 Ch 303.

Although the preference shares are entitled to a preference over the ordinary shares in respect of dividends, they are paid off only equally with the ordinary shares on the winding up of the company. They do not get any preferential treatment there. But the articles may make a provision to treat them as preferential even as to capital. In that event the preference shares will certainly be entitled to be paid up before the ordinary shares out of the surplus assets of the company. The question, however, whether the holders of preference shares are entitled to participate in any surplus capital is a question of consideration of the articles and the terms of issue. *Re National Telephone Co.*, (1914) 2 Ch 187; *Re John Dry Steam Tugs*, (1932) 1 Ch. 594.

## (2) Ordinary shares

Next come the ordinary shares. A large part of the net profits of a company, after paying the fixed dividend on the preference shares (if any), is paid as dividend on the ordinary shares.

## (3) Deferred shares

Deferred shares are also called founders' shares and they are usually allotted to the promoters of the company in consideration of the services rendered by them in bringing about the company. Such shares can be validly allotted as fully paid up to the promoters. They may also be issued to underwriters in consideration of the commissions due to them from the company. In either case, the contract or particulars of the contract must be filed with the Registrar, and the number of such shares must be stated in the prospectus or in the statement in lieu of prospectus (s. 93).

The peculiarity of deferred shares is that they are usually entitled to a certain proportion of the profits which remain after paying

the dividend on the capital paid up on all the other shares for the time being issued at a particular rate, e.g., the deferred shares may be entitled to half the profits after a dividend of ten per cent has been paid on the ordinary shares. They rank for dividend after all prior interests have received dividends according to the terms of the articles.

#### (4) Redeemable preference shares

There is a fourth variety of shares introduced by the new s. 105B of the Act which reproduces the provisions of s. 46 of the English Act, 1929. According to this section, a company, if authorised by its articles, may issue preference shares redeemable out of profits, or out of the proceeds of a fresh issue of shares, or out of sale proceeds of any property of the company. Mere conversion of preference shares already issued into redeemable preference shares under a scheme of arrangement is not an 'issue' within the meaning of this new section, and, therefore, such conversion is not authorised by sub-sec (1) of this section, and the Court will not sanction a scheme under which such conversion is sought to be effected. In *re St. James' Court Estates, Ltd.*, (1944) 1 Ch. 6. Such shares, however, must be fully paid and, if they are redeemed out of profits or sale proceeds of any property, the amount applied must be carried to a 'capital redemption reserve fund' which for the purposes of reduction of capital must be treated as paid-up capital. Where, on the other hand, they are redeemed out of the proceeds of a fresh issue of shares, the premium, if any, payable on redemption must have been provided for out of the profits of the company before they are redeemed. The balance sheet of the company must also include a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which they are, or at the option of the company are to be, liable to be redeemed, or, where no date is fixed for redemption, the period of notice to be given for redemption. In case of non-compliance with this requirement, the company and every officer of the company who is a party thereto shall be liable to a fine not exceeding one thousand rupees. New shares upto the nominal amount of the shares to be redeemed may be issued before redemption of the old ones in any one of the three modes specified above, but the exemption from stamp duty chargeable on increase of share capital shall not be available to the former unless the latter are redeemed within one month of the new issue. It would be otherwise if they are issued after redemption of the old shares which, too, the company is entitled to do under cl. (4) of the section.

Cl. (5) of the section provides that where shares are redeemed out of the profits of the company or sale proceeds of any of its property, and the sum so applied is carried to the 'capital redemption

reserve funds' as stated above, and the company has issued new shares under this section, the fund may be applied, upto an amount equal to the nominal amount of the shares so issued which, in its turn, must be upto the nominal amount of the shares redeemed, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

### RESERVE CAPITAL

It has been stated that capital of a company fixed by the memorandum may be called up as and when the company desires it. But a company may have a certain portion of the capital as 'Reserve Capital,' i.e. a capital which cannot be called in except on winding up of the company. This must be done by a special resolution of the company (s. 69)

Another peculiarity of 'Reserve Capital' is that it cannot be dealt with in any manner nor can it be converted into ordinary capital without the leave of the Court *Barlett v. Mayfair Property Co.* (1898) 2 Ch. 28. In this case, £5 out of each £10 share was declared as reserved capital of the company by a special resolution. Thereafter, debentures were issued charging the said reserve capital and the company's property. It was held that the reserve capital of £5 per share was not charged and the debenture-holders had not a first claim upon it.

### ALTERATION OF CAPITAL

Now, the capital of a company may be altered by the company whenever it finds such alteration necessary. But the power to alter the capital must be given by the articles of the company and the manner in which the alteration can be effected should also be laid down, by the articles. If no such power is given and the manner laid down, the company may, by a special resolution, alter the articles so as to provide for them.

The capital of a company may be altered in several ways. It may be increased, or the company may consolidate, divide, cancel or convert the shares into which the capital is divided under the memorandum. The Act provides for these various alterations in ss 50 and 55. These sections provide one more case of alteration of a memorandum of association.

### INCREASE, CONSOLIDATION, ETC, OF THE SHARE CAPITAL

Now, the share capital of a company, whether converted into stock or not, may be increased by the company in general meeting by an issue of new shares of such amount as the company thinks expedient [s. 50 (1) (a)], and the resolution sanctioning the increase may direct the manner in which such new shares shall be issued or

distributed. Where the capital is increased beyond the registered capital, [which is really the case contemplated by s. 50 (1) (a)], the notice of increase including particulars of the classes of shares affected and the conditions, if any, subject to which the new shares are to be issued must be filed with the Registrar within fifteen days of the passing of the resolution. In case of a company not having a share capital and increasing the number of its members beyond the registered number, it must file a notice of the increase of members within the same time after such an increase was resolved upon or after it took place actually. In case of default, the company and every officer knowingly and wilfully authorising or permitting the same shall be liable to a fine to the extent of Rs. 50 per day. (S 53).

It may be noted here that where the directors decide to increase the paid-up capital by the issue of further shares out of the authorised capital of the company the new s 105C requires those shares to be offered to the existing members in proportion to the shares held by them, irrespective of class, by a notice limiting the time within which the offer, if not accepted, will be deemed to be declined. If the offer is not accepted, or the time specified expires, the directors may dispose of them in the best manner possible. **Pingle Venkat Rama Reddy v Sir Padampat Singhania**, 51 Bom. L. R. 529. Reading S 105 (c) and regulation 42 of Table A of Schedule I of the Act, the Legislature would appear to have intended to enact a principle of equitable distribution of new shares which has got to be carried out 'as practically as possible'. Besides, in exercising the power to issue new shares, it is the duty of the directors to be guided only by the consideration of the interests and benefit of the company. **Nanlal v BombLife Assn Coy**, 50 Bom L. R. 413

Similarly, a company limited by shares may, in pursuance of the power conferred by the articles and in general meeting, consolidate and divide all or any of its share capital into shares of larger amount than the existing shares or convert all or any of the paid-up shares into stock and reconvert stock into paid-up shares of any denomination [S 50 (1) (b) & (c)]. Notice of the consolidation, conversion or re-conversion should be filed within fifteen days thereof with the Registrar. In case of default in either of these cases, both the company and every officer thereof who may be a party thereto shall be liable to a fine extending to Rs 50 per day (s. 51).

A company may also be authorised by the articles to sub-divide the capital into shares of smaller amount than is specified in the memorandum. This power must also be exercised in general meeting. The effect of such sub-division will be that the amount remaining unpaid on each new share shall be proportionate to that unpaid on the shares from which the division is made [s. 50 (1) (d)]. If, for instance, shares of Rs. 1,000 each, on which Rs. 500 have been

already paid are sub-divided into 10 shares of Rs. 100 each, the new shares must be each of Rs. 50 paid.

Similarly, a company may cancel any shares which at the date of exercising the power in that behalf have not been subscribed for or agreed to be subscribed for by any person, and diminish the amount of its share capital by the amount of the shares so cancelled. This sort of diminution of the capital is not to be deemed the reduction of share capital within the meaning of the Act [s. 50 (1) (e)].

### REDUCTION OF SHARE CAPITAL

Firstly, the power to reduce capital must be given by the articles. If no such power is given, the articles may be changed by a special resolution so as to confer such power on the company. It is not sufficient if such power is contained in the memorandum. The articles must also confer such power. *Re Dexine Patent Packing Co.*, (1903) WN 82; *Patent Invert Sugar Co. Ltd.*, 31 Ch. D 116

Now under s. 55 of the Act, the capital may be reduced

(a) by reducing or extinguishing the liability of members for uncalled capital, or

(b) by writing off lost capital, or

(c) by paying off capital which is in excess of the wants of the company, or

(d) in any other way approved by the Court

Reduction under cls. (b) and (c) may be made either in addition to or without extinguishing or reducing the liability of members for uncalled capital.

Pursuant to the reduction of the share capital, necessary alterations must also be made in the memorandum.

### Procedure for reducing capital

But the special resolution of the company reducing the capital must in all cases be confirmed by the Court and, for that purpose, the Court is empowered by the Act to inquire into the objections that may be raised by the creditors of the company in that behalf. It has been made an imperative duty of the Court in such cases to settle the list of creditors entitled to object and issue public notices fixing a day or days within which creditors who are entered on such list are to claim to be so entered or to be excluded from the right of objecting to the reduction (s. 58).

On settlement of the list of creditors and after hearing their objections, if any, the Court, on being satisfied that either the creditors consent to the reduction or their debts or claims have been discharged or secured by the company, may confirm the reduction on such terms and conditions as it may think fit. The Court may also require the company to publish the reasons for reduction for the information of the public (s. 60).

It may be noted that the creditors have a right to object only if the reduction involves (a) diminution of liability in respect of unpaid share capital, or (b) payment to any share-holder of any paid-up capital, or (c) in any other case if the Court so directs [s. 58 (1)]. *Meux Brewery Co. Ltd.*, (1919) 1 Ch 28.

If, however, any creditor entitled to object to the reduction of share capital is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his claim, not entered on the list of creditors and, after the reduction, the company is unable to pay the amount of his debt on claim, then, (1) every person who was a member of the company at the date of the registration of the order for reduction shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to wind up on the day before the registration, and (2) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable as contributories, and make and enforce calls and orders on them as if they were ordinary contributories in a winding-up. In such a case, however, the rights of the contributories *inter se* will not be affected (s. 63).

On the resolution thus being confirmed by the Court, a certified copy of the Court's order and the minute of the resolution must be filed with the Registrar. Until these are registered, the resolution reducing share capital as confirmed by the order of the Court does not come into effect. To show that these documents are registered, the Registrar issues a certificate which will be conclusive evidence of the requirements of the Act with respect to reduction of share capital having been complied with and that the share capital of the company is such as is stated in the minute of the resolution of the company (s. 61). Such certificate cannot afterwards be impeached on the ground either that the company had not by its articles any power to reduce (*Re Walker and Smith Ltd.*, 72 L. J. Ch 572), or that the special resolution for reduction was invalid [*Ladies Dress Association v Pulbrook*, (1900) 1 Q. B. 376].

#### Effect of reduction on company's name

The Act further requires that the company, in cases of reduction of share capital involving the payment to any shareholder of any paid up share capital or diminution of any liability on uncalled capital, should add the words 'and reduced' to its name from the date of the resolution until such time as may be fixed by the Court. In other cases, these words should be added on and from the date of the order of the Court confirming the reduction unless the Court thinks it expedient to dispense altogether with the use of such words (s. 57). The object of adding these words is to give notice of



the reduction of the capital to outsiders who may be dealing with the company on the faith of the amount of capital which appears in the memorandum.

### **Reduction by company purchasing its own shares prohibited**

Prior to the amendment of the Act in 1936, s. 55 (1) clearly provided that no company limited by shares shall have power to buy its own shares unless the consequent reduction of capital was effected and sanctioned in the manner provided in the subsequent clauses of that section **Barkat Ali v. Official Liquidator**, A. I. R. (1943) Mad. 111. This prohibition was, however, in some cases circumvented by advancing money out of the company's funds to its nominees who acquired the shares. The Amendment Act, therefore, introduced a section, which is numbered 54A, based upon s. 45 of the English Act, to prevent such subterfuge and sub-sec. (1) of s. 55 is transposed as sub-sec. (1) of the new section.

According to this new section, now, loans by a company limited by shares on the security of its own shares, and financial assistance by such company to a person to enable him to purchase its own shares or those of a public company of which it is a subsidiary company are strictly prohibited. But this prohibition does not extend to loans by a lending company in the course of its business. Nor does it extend to a private company unless it is a subsidiary company of the public company. In case of contravention of these provisions, the company and every officer who is a party thereto shall be liable to a fine not exceeding one thousand rupees. Nothing in this section, however, shall affect the right of a company to redeem any shares issued under the new s. 105B.

Though the aforesaid new section imposes an important check on the powers of a company limited by shares, it may well be doubted whether such company cannot render financial assistance to a person to 'subscribe' for its own shares. It has been recently held in England in this connection that an acquisition of shares in a company by application and allotment is not a 'purchase' within the sub-section (1) of s. 45 of the English Companies Act, 1929, which, accordingly, does not cover a transaction by which a company provides money to assist a subscription for its own shares. **In re V. G. M. Holdings Limited**, (1942) Ch. 235. It may, however, be noted that this section does not invalidate or avoid the security to which it refers. A company cannot maintain an action to be relieved of the security because the object of the section is not to protect but punish a company providing security in contravention of the section. **Victor Battery Co., Ltd., v. Curry's, Ltd.**, (1946) 1 A. E. R. 519.

### **RE-ORGANIZATION OF SHARE CAPITAL**

A company may also need to re-organize its share capital by altering the rights of holders of different classes of shares. If the

re-organization involved (a) consolidation of shares of different classes, or (b) division of shares into shares of different classes and an alteration of the memorandum was necessary, it was so far required to be done by a special resolution confirmed by an order of the Court under s 54 of the Act. Further, under that section, no special rights attached by the memorandum to any class of shares could be interfered with by such re-organization alone, but a resolution passed by a majority in number of the shareholders holding three-fourths of the share capital of that class was necessary in addition. This section 54, however, has been now deleted by the Indian Companies (Amendment) Act, 1942 (XVII of 1942), and sub-sec (6) of s 153 has been enlarged so as to bring it in conformity with similar sub-section of s 153 of the English Companies Act 1929. This new sub-section *inter alia* provides that an 'arrangement' under that section (153) includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods. The result of this amendment is that re-organization of capital shall be now carried out in the same way as any other 'arrangement' within the meaning of s 153 may be effected under the provisions of that section. The subject of 'arrangement' and schemes of reconstruction and amalgamation is dealt with in the twelfth lecture and the procedure for carrying these schemes into effect is there set out in necessary detail.

### VARIATION OF SHAREHOLDERS RIGHTS

It has been stated that shares may be issued as of different classes with different rights attached to each of them. The rights so attached to any class of shares may be varied in accordance with the provisions made in that behalf by the memorandum or the articles, as the case may be. The usual provision is that they may be altered subject to the consent of any specified proportion of the holders of the issued shares of that class or with the sanction of a resolution passed at a separate meeting of the holders of those shares. This power to alter the rights of the holders of a class of shares is, however, sometimes not used unfrequently particularly when it is contained in the articles. Where a large number of the holders of shares of a class also holds shares of another class, they may make it very difficult for those who hold shares of the class affected to obtain a sufficient number of votes at a meeting to provide alterations which are really in the interest of that class. To meet this difficulty, the Amendment Act, 1936 introduces entirely a new section 66A which is a reproduction of s 61 of the English Act, 1929. That section provides that the holders of not less than 10 per cent of the shares of the class affected by the variation (15 per cent under the Eng Act) may apply to the Court to have the variation cancelled and it will not then become effective unless and until it

is confirmed by the Court. Such application must be made within 14 days (7 under the Eng. Act) after the date on which the consent was given or the resolution was passed. It may be made on behalf of the shareholders entitled to make the application by such one or more of their numbers as they may appoint in writing for the purpose. The persons presenting such application, however, should not have consented to or voted in favour of the resolution for the variation. Otherwise, they would have no ground to complain against the variation. The Court, if satisfied that the variation would unfairly prejudice the rights of the class represented by the applicants, may disallow the variation but, if not so satisfied, it shall confirm the same. The decision of the Court in either event shall be conclusive and no appeal would lie against it. The expressions 'variation' and 'varied' in this section include 'abrogation' and 'abrogated' respectively.

Whatever the order of the Court, the company is required to forward the copy of the order to the Registrar within 15 days from the date thereof. In case of default, the company and every officer who is a party thereto shall be liable to a fine not exceeding Rs. 50.

## STOCK

A word may be said here about the 'stock' of a company. When shares have been fully paid up they may, if so authorised by the articles, be turned into stock by the company in general meeting as provided in s. 50 (1) (c). Stock is not divided in equal shares or parts and the divisions are not numbered but it may be divided into any amount. Thus, a shareholder may hold Rs. 10 worth of stock though his shares had originally been Rs. 100 each. Notice of the conversion of paid up shares into stock must be filed with the Registrar and thereupon the rules regarding shares would cease to apply to such stock. The register of members and the list of members to be filed with the Register must thereafter show the amount of stock held by each member instead of the amount of shares (s. 52).

The difference between shares and stock is explained by Lord Cairns in *Marrice v. Aylmer*, (1874) 10 Ch. App. 148 at p. 154 in the following words:—

"The use of the term 'stock' merely denotes that the company have recognised the fact of the complete payment of the shares, and that the time has come when these shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, e.g., of directors who must possess a certain number of shares, and that the meetings shall be of persons entitled to this stock who meet and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock."

## LECTURE VIII

## SHARES

*Shares and their Allotment—Return as to Allotment—When can shares be issued at a discount—Commission and Brokerage on shares—Allotment of fully or partly paid shares—share certificates—Transfer of shares—Certification of transfer—Share warrants—Calls—Forfeiture—Surrender—Lien—Dividends.*

## SHARES AND THEIR ALLOTMENT

A share is a right to receive a certain proportion of the profits made by a company while it is a going concern, and of the capital of the company when it is wound up. The shares in a company are all numbered and the shares of each member are identified by these numbers.

The Act defines a share as a share in the share capital of the company, and includes stock except when the distinction between stock and shares is expressed or implied [S. 2 (1) (16)].

It has been noticed in the lecture on shareholders what an allotment is and how it is to be made. An allotment of shares is really an act of the company by which an applicant for shares becomes the holder of unappropriated shares which cannot further be allotted by the company to any other applicant even with his consent. *Mumtaz Bank Ltd. v. Syed Masud Ali*, A.I.R. (1937) Lah 812. It does not amount to a transfer of property within the meaning of the definition of 'conveyance' in the Stamp Act. *In re Madura Mills Co., Ltd.*, (1937) 1 M. L. J. 108. An application for shares is an offer and the allotment in pursuance of the terms of the application is an acceptance of the offer. Such acceptance is to be communicated to the applicant by a notice of allotment. The allotment must be made within a reasonable time, otherwise the applicant is not bound to accept it. *Indian Co-operative Navigation v. Padamsey*, 36 Bom. L. R. 32. At the same time, in the case of a public company, the allotment cannot be made till after a prospectus or a statement in lieu of prospectus has been filed (s. 98).

## Minimum Subscription

Now, the Act by s. 101 provides as to when an allotment can be made. The first two clauses of this section have been replaced by new ones similar to s. 39 of the English Act, 1929, with a view to discourage floatation of companies with insufficient capital. Under the old clauses, the directors could proceed with the allotment as soon as the minimum subscription as fixed by the articles was subscribed. This provision was, however, rendered practically useless by the practice which grew up of fixing only seven or ten shares

as the minimum subscription. The new clauses now provide the basis for fixing the minimum subscription and require it to be stated in the prospectus where the shares are offered to the public. The first clause says that no allotment shall be made of any shares offered to the public unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors, must be raised by the issue of these shares in order to provide the sums or if any part thereof is to be defrayed in any other manner the balance of the sum required to be provided in respect of the matters specified in cl. (2) has been subscribed and the sum at least of 5 per cent thereof has been paid to or received in cash by the company.

The matters above referred to are:—

(a) the purchase price of any property purchased or to be purchased which is to be paid out of the whole or part of the proceeds of the issue;

(b) any preliminary expenses and underwriting commission payable by the company;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters; and

(d) working capital.

The Amendment Act has also added three other clauses to this section. Cl. (2A) provides that the minimum subscription stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash. Cl. (2B) says that moneys received from applicants for shares shall be deposited and kept in a scheduled Bank as defined in the Reserve Bank of India Act, 1934, until returned under cl. (4) of the section or until the certificate to commence business is obtained under s. 103. Cl. (2C) is a penal section for breach of the provisions of cl. (2B).

It will be noticed that all these new clauses are applicable only where shares are offered to the public for subscription. Where no such offer is made a company can fix the minimum subscription in its articles at any amount, and on the same being reached, the directors may proceed to allotment; where no minimum subscription is fixed, the whole amount of the share capital payable in cash should be subscribed. In either case, the company must receive five per cent of the nominal amount of each share payable in cash before any allotment takes place. [S 101 (7)] This provision does not apply to a private company.

### **Application Money**

There is a further condition in respect of companies offering shares to the public, namely, that they must receive at least five per cent of the nominal value of each share subscribed for as application money [s. 101 (3)]. When all these conditions are fulfilled, and after the prospectus or a statement in lieu of prospectus has been filed as provided by s. 98, a company can proceed to allotment.

### Consequences of non-fulfilment of above conditions

If these conditions are not fulfilled within 180 days after the issue of the prospectus, all moneys subscribed must be refunded, without interest within 10 days thereafter and, if not so refunded, the directors shall be jointly and severally liable to repay the same with interest at the rate of 7 p. c. from the expiration of the 190th day [s. 101 (4)]. Any condition requiring or binding an applicant for shares to waive compliance with any of these requirements is expressly declared to be void [s. 101 (5)].

The provisions of this section except sub-sec. (3) as regards application money are not applicable to any allotment of shares subsequent to the first allotment of shares offered to the public [s. 101 (6)]. Sub-sec. (3), however, only says that the amount payable on application on each share shall not be less than five per cent of the nominal amount of the share. Directors may, therefore, allot shares to applicants who neglect to pay the application money, once the first allotment has been regularly made. *In re Happy India Insurance Co. Ltd.*, (1939) 2 Cal. 512

### Effect of irregular allotment

In spite of the stringent provisions of s. 101 and s. 98, one may find an allotment made in utter contravention thereof. The directors may choose to take a chance and proceed to allot shares although the minimum subscription required under cl. (1) of s. 101 is not reached or a prospectus or a statement in lieu of prospectus is not filed. Such an allotment is treated by the Act as irregular and voidable at the instance of any applicant to whom such allotment is made within one month after the holding of the statutory meeting, or, in cases where the company is not required to hold a statutory meeting or where the allotment is made after the holding of such meeting, within one month after the date of the allotment and not later. It could also be avoided during that period even if the company in the meantime goes into liquidation. [S. 102 (1)] In this connection, it has been held that actual legal proceedings to avoid the allotment need not be taken within the period specified. Notice of avoidance, followed by prompt legal proceedings though after the month, would be sufficient. *In re National Motor, etc., Co.*, (1908) 2 Ch. 228.

Furthermore, cl. (2) of s. 102 imposes a penalty on every director of a company, who knowingly contravenes or authorises the contravention of any of the provisions of s. 98 or s. 101 with respect to allotment and provides for compensating the company and the allottee for any loss, damage or costs which they may have sustained or incurred thereby. But the proceedings for such compensation can only be taken within two years from the date of the allotment. Every such director is also guilty of misfeasance under s.

235 of the Act **Indian States Bank Ltd., v. Sardar Singh, A. I. R. (1934) All 855.**

### RETURN AS TO ALLOTMENT

On an allotment being made, the company must, within one month thereafter or such further time as may be allowed by the Registrar under sub-sec. (2A) added to s. 104 by the Amendment Act XXVI of 1941,—

(i) file with the Registrar a return of the allotment stating the number and nominal amount of the shares with the names, addresses and descriptions of the allottees and the amount paid or due and payable on each share;

(ii) produce for the inspection and examination of the Registrar all contracts in writing of sale, or for services or other consideration in respect of which any shares are allotted as fully or partly paid up otherwise than in cash, and file with the Registrar copies thereof and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been issued; where such contracts are not in writing, the prescribed particulars thereof should be filed. No return need, however, be filed in respect of any allotment of shares which have been forfeited for non-payment of calls.

In case of default, every officer of the company who is knowingly a party thereto shall be liable to a fine not exceeding Rs 500 a day unless the Court on an application for relief is satisfied that the default was due to inadvertence or an accident, or that on other grounds it is just and equitable to grant relief and makes an order extending the time for the filing of the document for such period as it may think proper. (S. 104).

### WHEN CAN SHARES BE ISSUED AT A DISCOUNT ?

Since every shareholder is liable to pay the whole nominal amount of his shares in cash and the shares payable in cash represent one of the kinds of the capital of the company, a company cannot issue its shares at a discount. For instance, it cannot issue a Rs 100 share with an agreement that only Rs. 75 shall be paid. **Ooregaum Gold Co. v Roper, (1892) A. C. 125.** Even if the company is in difficulties, or wants to compromise a creditor's claim, it cannot issue shares at a discount. **Mother Lode Gold Mines v Hill, (1903) 19 T. L. R. 341.**

The Amendment Act, however, has introduced s. 105A in terms of s 47 of the English Act, 1929, authorising a company to issue shares of a class already issued at a discount if the resolution in that behalf is passed by the company in a general meeting and is confirmed by the Court. The resolution must specify the maximum rate of discount at which shares may be issued. Such discount, however, should in no case exceed 10 per cent. Further, such shares

cannot be issued at least for a year since the date on which the company became entitled to commence business, but at the same time they must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may have allowed.

The section further requires that the particulars of the discount so allowed and so much of the discount as has not been written off must be stated in every prospectus and balance sheet issued after the issue of such shares. In case of default, both the company and every one of its officers party thereto shall be liable to a fine not exceeding Rs. 50.

### COMMISSION AND BROKERAGE ON SHARES

Although shares as a rule could not be issued at a discount, commission on shares was permissible on certain conditions even prior to the amendment. These conditions are laid down in s. 105 of the Act. The general rule of law is that a company cannot, save as provided in the new s. 105A, apply any of its shares or capital, either directly or indirectly, in the payment of any commission, discount or allowance to any person in consideration of his subscription for any shares unless

(1) the payment is strictly by way of commission and not with a view to issue shares at a discount;

(2) the payment of the commission is authorised by the articles;

(3) the payment does not exceed the amount of rate authorised by the articles;

(4) the amount of rate paid or agreed to be paid is disclosed in the prospectus or statement in lieu of prospectus, as the case may be

The commission under these provisions can be paid to underwriters, procurers of persons to take shares, and also to persons taking shares. Any attempt, however, to issue shares at a discount by allowing the so-called commission to a subscriber of shares is against the provision of s. 105 and the company may be restrained from doing so *Keating v Paringa Mines Ltd.*, (1902) W. N. 15. In this case, the company's £1 shares stood at 3s. in the market. The company proposed to issue 120,000 shares of £ 1 each on the terms that a bonus of 7½% would be returned to each applicant, and also that a commission of 10% on the amount produced by the issue would be paid to certain guarantors. It was held that it was an issue of shares at a discount and was illegal.

The distinction between a 'commission' or 'brokerage' and a 'discount' is that the former implies some service to the company beyond the mere agreement to take shares in return for the company's agreement to allot them. Such service may correspond to the one rendered by professional brokers, stock-brokers, bankers and the like who exhibit the prospectus of companies in their



place of business and send it to their customers and by whose mediation customers are induced to buy shares. **Andreae v. Kinc Mines, Ltd.**, (1918) 2 K. B. 454. If, therefore, shares are really found to have been issued at a discount the persons who take them become liable to pay for them in full. **Re James Pitkin & Co. Ltd.**, (1916) W. N. 112.

#### ALLOTMENT OF FULLY OR PARTLY PAID SHARES

Apart from the commission and brokerage that may be paid under s. 105, there is an exception to the rule that shares must be paid for in cash, namely, that a company may allot fully or partly paid up shares as consideration for a business or other property sold to the company. In this event, the company must file with the Registrar, within one month of the issue of such shares, a contract in writing, showing the title of the shareholder and the consideration he gave for the shares (s. 104).

But in case of such a contract if there be any fraud or the consideration is inadequate or illusory, the person to whom such fully or partly paid up shares are allotted will be held liable notwithstanding that the contract is filed with the Registrar. **Hongkong and China Gas Co. v. Glen**, (1914) 1 Ch. 527. But it was held in **Re Wragg Ltd.**, (1897) 1 Ch. 796 that, if a contract is filed and there is no fraud, the Court will not go into the question as regards the adequacy of the consideration. **Mosley v. Koffyfontein Mines, Ltd.** (1904) 2 Ch. 108.

Further, shares may be allotted as fully paid up in consideration of services performed by the promoters prior to the incorporation of the company, e.g., purchasing some property for the company. But the services in such a case ought to have really enhanced the value of the property sold to the company. If so, the allotment of fully or partly paid up shares to them may be said to have been made in part consideration of the property sold to the company, which in fact amounts to a brokerage. But where the value of such property has not enhanced nor has the company benefited by such services, it is difficult to see for what consideration such shares could be allotted, because past services are no consideration in law unless they are rendered at the request of the promisor, and there could not be any request from the company because it was not in existence when the services were rendered.

It may be noted, however, that in no case can a company issue fully or partly paid-up shares in consideration of promissory notes. **Chokkalingam v. Official Liquidator**, A. I. R (1944) Mad. 87.

#### SHARE CERTIFICATES

Share certificates are usually issued by the company under its common seal within three months after the allotment of its shares, debentures or debenture stock and within a similar period after the registration of the transfer of such shares, debentures or debenture

stock unless the conditions of issue thereof otherwise provide. In case of default, the company and every officer thereof who is knowingly a party thereto become liable to a fine not exceeding Rs. 50 per day till the default continues (s. 108).

#### **Effect: (a) Estoppel as to title**

Certificates are issued to enable a shareholder to show at once a good *prima facie* title to the shares which he holds, and thereby to deal with them in any manner he likes (s. 29). Consequently, the company issuing a certificate stating that A is the registered holder of a certain number of its shares cannot afterwards allege that A is not entitled to those shares. **Dixon v. Kennaway**, (1900) 1 Ch. 833. In this case, L was the secretary of the company and a stock broker. Mrs. D applied to L for 300 shares and paid for them. P (clerk to L) who owned no shares in the company executed a transfer of 300 shares to Mrs. D. The company without requiring P's certificates to be produced registered the transfer and gave Mrs. D a new certificate. It was held that the company was estopped from denying the validity of Mrs. D's certificate and was liable to her in damages.

It must be noted, however, that the officer issuing the certificate must have an authority of the company in that behalf, otherwise there would be no estoppel against the company. **Ruben v. Great Fingall Consolidated**, (1906) A. C. 439; **South London Greyhound Race Courses, Ltd. v. Wake**, (1931) 1 Ch. 496.

#### **(b) Estoppel as to payment**

Further, if the certificate shows that the shares are fully paid, the company cannot afterwards allege that they are not fully paid. **Bloommenthal v. Ford**, (1897) A. C. 156.

A certificate, however, does not certify anything as to the equitable interest in the shares, and the company would be under no obligation to a person who holds such interest. **Rainford v. James Keith, Limited**, (1905) 1 Ch. 296. In this case, C, the registered holder of 120 shares, mortgaged them to R by deposit of his certificate. Later, C sold the same shares to Y, and told the company that the certificate was with a friend of his and said nothing about the same being held by R by way of security. The company registered Y as the holder of the shares and gave him a certificate. It was held that company was negligent in accepting such an excuse from C but, in spite of that, the company was not liable as it owed no duty to R. There was no question of estoppel by certificate in this case, for the certificate simply stated that C was the registered holder, which was, indeed, true.

### **TRANSFER OF SHARES**

S. 28 of the Act gives power to every shareholder of a company to transfer his shares in the manner provided by the articles of the company. The section also lays down that shares are to be regard-

ed as movable property. The statute, therefore, gives the right to transfer and the articles prescribe the mode of transfer and the restrictions upon it. The restriction, however, should not be absolute. Thus, where the articles provided that, before any shares are transferred, option to purchase them should be given to the other shareholders, it was held that such a restriction on the right to transfer shares was not invalid. *Borland v. Steel*, (1901) 1 Ch. 279; *Ontario Jockey Club v. McBride*, (1927) A. C. 916. In the absence of any proper kind of restriction, the right to transfer is so absolute that even a transfer to a man of straw made with the clear intention of escaping liability, if out and out, would be valid. *Lindlar's case*, (1901) 1 Ch. 312.

### Procedure for executing transfer

The transfer must be made in writing in the form, if any, prescribed by the articles. Where no such form is prescribed, it must be usually in the form mentioned in cl. 19 of Table A. It must be executed by the transferor and handed to the transferee with the share certificate. Where the articles require such transfer to be made by a deed, it should be signed, sealed and delivered and a blank transfer in this case would be wholly void and inoperative. The transferee must then execute the transfer.

On completion of these formalities, the transfer of shares should ordinarily be deemed to have been effected, as nothing more remains to be done on the part of the transferor and the documents delivered to the transferee carry with them the right and title to be registered as the owner of the shares which the transferee can enforce. *Bharucha v. Vadilal*, 28 Bom. L. R. 777. The transferor does not impliedly undertake to procure registration of the transfer. *London Founder's Association v. Clarke*, 20 Q. B. D. 576. He is only a trustee of the shares for the transferee until the registration of the transfer. *Hardoon v. Belilios*, (1901) A. C. 118. If the transferee wishes to protect himself, he must take the shares with 'registration guaranteed'. Accordingly, in the absence of any such stipulation, if the directors for any reason refuse to register it, the transferor is not liable and the transferee cannot recover the price of the shares from him on the ground of failure of consideration. *Stray v. Russel*, 1 E. & E. 888. On the contrary, on the transfer being thus completed, there arises an implied contract on the part of the transferee to indemnify the transferor against future calls in respect of the transferred shares. *Hardoon's case* (*supra*); *Spencer v. Ashworth & Co.*, (1925) 1 K. B. 589.

Though the transfer is thus completed, it is really incomplete for the transferee because the company is not bound to recognize the transferee as the holder of the transferred shares until the transfer is registered and his name is entered on the register of its

members in place of the transferor. *Societe Generale v. Walker*, 11 A. C. 20; *Roots v. Williamson*, 38 Ch. D. 485; *In re Copal Varnish Co. Ltd.*, (1917) 2 Ch. 349.

### Procedure for registering transfer .

Prior to the amendment of the Act in 1936, no procedure for the transfer of shares was laid down by the Act and it was entirely provided for in the articles. Consequently, undue restrictions upon transfers and undue delay in registering transfers were found to be not uncommon. The Amendment Act has, therefore, substituted a new section for the old s. 34 of the Act which first requires an application for transfer of shares either by the transferor or the transferee. Where such application is made by the transferor and the shares transferred are partly paid, the company should give a notice thereof to the transferee. If no objection is raised to the proposed transfer by the transferee within two weeks from the date of the receipt of the notice, the company must register the transfer if it so decides and enter the name of the transferee in its register of members as if the application was made by the transferee himself. The section, however, does not require such a notice where fully paid shares are transferred. Nor does it provide for a notice to the transferor when the application is made by the transferee. It is however, usual for a company to give such notice, but the transferor is not bound to reply. If he does not, he will not be thereby estopped from denying the validity of the transfer. *Barton v. L. & N. W. Ry. Co.*, 24 Q. B. D. 77. Secondly, the section says that it will not be lawful for a company to register a transfer of shares or debentures unless the proper instrument of transfer duly stamped and executed has been delivered to the company along with the share scrip [*New Citizen Bank v. Asian Assurance Co.* I. L. R. (1945) Bom 334.] or unless it is proved to the satisfaction of the directors that the instrument of transfer duly executed has been lost, in which case the company may, on an application in writing made by the transferee and stamped as an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit. Thirdly, in case of the company refusing to register a transfer, it is required to notify the same to the transferor and the transferee within two months from the date on which the instrument of transfer was lodged with the company. Then follows a penal clause which in default of compliance with the preceding requirement as to notice of refusal to register makes the company and every officer who may be a party thereto liable to a fine not exceeding Rs. 50 a day. Cl. (6) saves the power of the company to register as shareholders or debenture-holder any person to whom the right to any shares or debentures of the company has been transmitted by operation of law.

### Directors' power to refuse registration of transfer

It must be noted that this new section by cl. (7) specifically saves from its operation the power of the directors to refuse to register a transfer if such power is given to them by the articles. It only compels them to notify the fact of their refusal both to the transferee and the transferor within the time therein specified. It must, however, be noted that an article of association which gives the directors absolute and unrestricted discretion to refuse to register a proposed transfer of shares has no application to the Court-sale, and the directors cannot refuse to register a transfer of shares effected by a Court-sale. In *re Wahid Bus & Mailsi Transport Co.*, A. I. R. (1949) Lah. 6.

The directors may be given power by the articles to reject a transfer, if, for instance, the calls on shares are unpaid, or the company has a lien on the shares, or if they do not approve of the transferee. In such cases, whether a certain transfer should be rejected or not is entirely a matter within the discretion of the directors which must be exercised *bona fide* and in a just manner. The Court will not interfere with their discretion unless it can be shown that they did not act *bona fide*. *Re Coalporte China Co.*, (1895) 2 Ch. 404; *Matheran Steam Tramways Co. v Lang*, 33 Bom. L. R. 184; *In re Smith and Fawcett, Limited*. (1942) Ch 304, 306. They are, again, not bound to disclose any reason for rejecting a transfer, for to compel them to do so would deprive the power of rejecting transfers of half its efficacy. But if they choose to give reasons for their decision, the Court may inquire whether they are legitimate or not. *Re Bell Bros.*, 65 L. T. 245; *In re Bead Steamship Co.*, (1917) 1 Ch. 127, 136. And if the Court comes to the conclusion that the directors had wrongfully refused to register the transfer, the transferee will be entitled to damages on the basis of a fall in the market price of the shares between the date of final refusal of the company to register the transfer and the date of suit. Where there has been no fall in the market price, the transferee would be entitled to nominal, if not substantial, damages. *Thenappa v. Indian Overseas Bank*, A. I. R. (1943) Mad. 743.

### Blank transfer

Shares may be mortgaged by depositing the certificate with the creditor. Sometimes a blank transfer of shares is also made. A blank transfer is one in which the name of the transferee is not filled. Whenever such a transfer is made an implied authority is given to the mortgagee to fill in the blank and perfect his security by getting himself registered as a shareholder even after the death of the transferor. In *re Bengal Silk Mills Co. Ltd.*, (1942) 1 Cal. 122. The idea of such transfer is that the creditor gets equitable interest in the shares, and he may sell them on failure of the mortgagor to

pay the debt after the lapse of a reasonable time. *Stubbs v. Slater*, (1910) 1 Ch. 632.

But a registered owner of shares does not, by handing over to another person the share certificate and a blank transfer signed by him, make a representation to the world that such person is entitled to deal with the shares in any manner so as to enable even an honest purchaser to obtain a good title thereto. If a debtor delivers to his creditor a blank transfer by way of security, that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract. If, however, such person gets himself registered as a shareholder and then transfers the shares to an honest purchaser, the title of the latter will be protected. *Abdul Vahed v. Hasanally*, 50 Bom. 229; *France v. Clark*, 26 Ch. D. 257.

### Effect of a forged transfer

Where a transfer is forged, and a company issues a certificate on such a transfer, the title of the original holder is not defeated by the certificate even if a notice is given to him of the application for transfer. *Barton v. L. & N. W. Rly. Co.*, 24 Q. B. D. 77. At the same time, if such a certificate is transferred to a *bona fide* purchaser for value, he does not get any right to be registered as a shareholder, but he is entitled to claim damages from the company for having acted on the certificate of the company stating that the transferor was the true owner of the shares. *In re Bahia, etc. Rly. Co.*, 3 Q. B. 384; *In re Kopje Diamond Mines*, (1893) 1 Ch. 618. Even the transferor in such a case is entitled to a similar remedy if he has acted upon the certificate and not only upon the forged transfer in his favour in transferring the shares represented by it and sustained damages owing to the company's refusal to register the transfer. *Balkis Consolidated Co. v. Tomkinson*, (1893) A. C. 396. On the other hand, the company is entitled to be indemnified by the person who procures a fresh certificate from the company on production of a transfer form against any loss due to forgery in respect of that transfer. *Sheffield Corporation v. Barclay*, (1905) A. C. 392; *Bank of England v. Cutler*, (1908) 2 K. B. 208. It is just possible that there may be several transfers in respect of the same shares. The priority in such a case is to be determined with reference to the point of time of each of the transfers where none of them is registered, but if a transfer later in date is registered it gets priority over the earlier ones which are unregistered.

### CERTIFICATION OF TRANSFER

Where a shareholder holding one share certificate in respect of a particular number of shares transfers only some of them, a new certificate will be required. Suppose A wants to sell 25 shares out of his 100 shares in a company. The procedure is for him to take his

certificate and transfer to the company. The company thereupon endorses on the transfer the fact of the certificate in respect of 100 shares having been lodged at its office. The company is thus said to certify the transfer and issues two new certificates for 25 and 75 shares respectively, the first for the transferee and the second for A.

### SHARE WARRANTS

When shares are fully paid, the company may, in pursuance of the provision made in the articles, issue share warrants under its seal stating that the bearer of the warrant is entitled to the shares or stock therein specified. The shares or stock then becomes transferable by delivery of the share warrant which is treated as a negotiable instrument. *Bechuanaland Exploration Co. v. London Trading Bank*, (1898) 2 Q. B. 658. The company may also provide by coupons or otherwise for the payment of future dividends on the shares or stock included in the warrants (Ss. 43 and 44). These provisions do not apply to private company.

On the issue of a share warrant, the name of the member is struck off the register as if he had ceased to be a member and the particulars as to the issue of share warrants are entered therein (s. 47). Still, the holder of a share warrant is usually deemed to be a member of the company under the articles to the extent provided therein. But the holding of share warrants will not be sufficient for qualifying as a director of the company (s. 46).

The bearer of a share warrant may also surrender for cancellation his share warrant whereupon, subject to the articles, his name is entered on the register of members of the company as a shareholder (s. 45).

### CALLS

A call may be defined as a demand by the company on its shareholders to pay whole or part of the balance remaining unpaid on each share made at any time during the continuance of the business of the company. A call can also be made by the liquidator in the course of the winding up of a company.

If shares of Rs. 1,000 each are issued to the public in this way, viz. that Rs. 50 should be paid on application, Rs. 100 on allotment and the remaining Rs. 850 when called for, the first two payments are not calls, but when the company calls upon the shareholders, say, about three months after the allotment to pay Rs. 200 on each share, the demand so made by the company is a call.

Sometimes a payment of a certain amount within a certain time of the allotment is also required by the articles or the prospectus. It has been held in *Croskey v. Bank of Wales*, 4 Giff. 314, that such demand is not a call probably because the company sets it down in the prospectus or the articles as one of the conditions for those who

apply for shares with a view to make it a part of the contract of purchase of shares.

Now, a shareholder is under a statutory liability to pay the amount for the time being unpaid on his shares in accordance with the articles of association. The nature of his liability is defined in s. 21 (2) of the Act which says that all money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company, but he is liable to pay for the calls only if they are made in strict pursuance of the provisions contained in the articles.

The usual manner in which a call is made is that a resolution specifying the amount of the call, the time when and the place where it is to be paid and the person to whom it is to be paid, is passed by the board of directors at a meeting where there is a proper quorum, and the secretary is directed to give all shareholders notice of the call.

Therefore, if a call is made in contravention of the manner laid down by the articles, it is invalid. *Re Cawley & Co.*, 42 Ch. D. 209; *In re Bengal Electric Lamp Works, Ltd.*, (1942) 1 Cal. 132; *Lakshmiah v. Adoni Electric Supply Co.*, A.I.R. (1944) Mad. 322. In *Cawley's* case, the directors passed a resolution fixing the amount of a call but omitted to fix the date of payment. It was held that there was no valid call until a subsequent resolution was passed fixing the date of payment. The call would then be valid as from the date of such subsequent resolution and a fresh notice to the members would be necessary. Merely issuing a notice without a proper resolution would not cure the defect. *The Pioneer Alkali Works Ltd. v. Amiruddin*, 28 Bom. L. R. 411. But where the articles concerned used the word 'may' and not 'shall' with respect to the place where and the person to whom the payment was to be made, it was held that the articles would be complied with if the directors appointed them, even though informally, before the notice of the call was sent out. *Dhunraj v. Wadia*, 35 Bom. L. R. 26. The shareholder, however, where the call is invalid, cannot waive his rights to object to the resolution and the notice. [*In re Bengal Electric Lamp Works*, (*supra*)] Nor is he bound to pay for such call, and if the directors proceed to forfeit his shares, he can obtain an injunction restraining them from so doing. *Galloway v. Halles Concerts*, (1915) 2 Ch. 233.

But if the irregularity is of a trifling nature, the call does not become invalid and the articles may provide that a call shall be good in spite of any irregularity. *Dawson v. African Consolidated Co.*, (1898) 1 Ch. 6. The articles in this case contained a clause that the acts of the directors will be valid even though some defect may be subsequently found in their appointment. Three of the directors made a call but one of them happened to be disqualified by having



parted with his qualification shares for a few days. It was held that the call was good.

The power to make calls is of a fiduciary character and must be exercised for the benefit of the company. In other words, a director is a trustee for the general body of shareholders in respect of his power to make calls. Therefore, if a call is made not for the benefit of the company but for their own advantage, the call is improperly made and its enforcement may be prevented by an injunction of the Court, or the directors may be compelled to hand over for the benefit of the company the advantage gained by them. **Lamb v. Sambah Rubber Co.**, (1908) 1 Ch. 845. If the directors make a call on the shareholders and pay nothing on their own shares in respect of such call, they are guilty of breach of trust. **Alexander v. Automatic Telephone Co.**, (1900) 2 Ch. 56.

Apart from calls, the directors may, if so authorised by the articles, allow a shareholder to pay up the amount due on his shares and may pay interest on the amount so paid in advance of calls (s 49). This power can be exercised only if it is for the benefit of the company. The typical case on this point is **Syke's case**, 13 Eq 255. The company in this case had no money to pay the directors' fees. The directors, therefore, paid into the company's bank the amounts remaining unpaid on their shares and on the same day paid those amounts to themselves in payment of their fees. It was held that this payment was not for the benefit of the company, and the directors remained liable to pay the amount still due on their shares.

When money has been paid by a shareholder in advance of calls he becomes a creditor of the company for the amount due to him as interest. Therefore, if there are no profits, the interest must be paid out of the capital. **Lock v Queensland Investment Co.**, (1896) A. C. 461.

It has already been seen that, on a transfer of shares, the transferee impliedly agrees to indemnify the transferor against future calls. But if the call was made before the transfer but payable after the transfer, the transferor apparently remains liable to pay the call, for a transferor transfers his right to future payments and liability for future calls. **National Bank of Wales**, (1897) 1 Ch. 298 at page 306.

## FORFEITURE

The power to forfeit shares must also be contained in the articles and the directors can forfeit the shares of a shareholder only in pursuance of the authority given by them. The articles usually provide that if a shareholder does not pay calls, his shares may be declared forfeited. Such provision in the articles does not constitute a penalty but is enforceable as a contract on the happening of events specified in it. **Surajmull v. Ballabhadas**, 63 Cal. 531. On forfeiture, the

shares become the property of the company and may be sold for any price which may be less than the amount actually paid up on such shares. Such shares, on being sold, can be re-issued to the purchaser and no return of the allotment of such shares need be filed with the Registrar [s. 104 (4)]. This is another exception to the rule that shares cannot be issued at a discount. The purchaser of such shares, however, remains liable to pay whatever was due in respect of them at the time of forfeiture and his liability will be in addition to what he may have paid for such forfeited shares and may have to pay for calls in the future.

The articles must further provide the manner in which shares are to be forfeited and the directors must proceed to forfeit shares only in that manner. Since the forfeiture may result in the permanent reduction of the capital of the company, it is not the person whose shares are being forfeited who is entitled to insist on the strict fulfilment of the conditions prescribed for forfeiture. *Premila Devi v. The People's Bank of Northern India, Ltd.*, 41 Bom L. R 147 (P. C.); *Brigg's case*, 1 Eq 309; *Prayanprasad v Gaya Bank and Trades Asso. Ltd.*, 10 Pat 249. Any irregularity is liable to make the forfeiture void and inoperative and the shareholder may bring an action for annulment of the forfeiture. *Garden Mining, etc., Co. v. McLister*, 1 A. C. 39. He may, in the alternative, prove for damages on the winding up of the company. *Re New Chili Co.*, 45 Ch. D 598.

It is, however, open to the shareholder whose shares have become liable to be forfeited to waive the provisions contained in the articles as to sending of notices and the like which may properly be regarded as being only directory. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, e.g., a power to forfeit shares for non-payment of calls that are not yet due. *Premila Devi's case*. (*supra*).

The power to forfeit shares, like the power of calls, is in the nature of a trust and must be exercised for the benefit of the company. If, for instance, shares are forfeited for the purpose of relieving a friend from liability, the forfeiture may be set aside. *Lord Wallcourt's case*, (1899) W. N. 256; *Spackmann v Evans*, 3 H.L. 186; *Re Ex-parte Trading Co.*, 12 Ch. D 191. Similarly, a provision in the articles that a shareholder shall forfeit his shares if he takes proceedings against the company is void because it would infringe the legal rights of the shareholders. *Peveril Gold Mines Ltd.*, (1898) 1 Ch. 122.

### Effect of forfeiture

The effect of forfeiture is that the shareholder whose shares are forfeited ceases to be a member of the company and, therefore, if the company is wound up more than one year after the forfeiture, he cannot be held liable as a contributory nor can the company, while a going concern, sue him for the calls which he has not paid unless

the articles so provide. If such provision is made, he may be sued as an ordinary debtor to the company. **Ladies' Dress Association v. Pulbrook**, (1900) 2 Q. B. 376. In this case, A's shares were forfeited for unpaid calls. More than one year after, the company was wound up. If A's liability depended upon his being a contributory, he could not be made liable as he ceased to be a member for over one year. It was, however, held that he was liable as an ordinary debtor under the terms of the articles and could be sued. **Indian Co-operative Navigation Co. v. Padamsey**, 36 Bom. L. R. 32, is also a decision to the same effect. The suit must, however, be brought within three years from the date on which the shares were forfeited. **Bishambhar v. Agra Electric Stores Ltd.**, 54 All. 541; **Maneklal v. Suryapur Mills**, 30 Bom. L. R. 549; **Ramu Seshayya v. Sri Tripura Sundari Cotton Press**, 49 Mad 468; **Mudholkar v Malak**, I. L. R. (1942) Nag 114.

## SURRENDER

There is no reference in the Act or Table A to surrender of shares. But the articles frequently give power to directors to accept surrender of shares. Courts also recognise the surrender of shares on the principle that it relieves the directors from going through the formality of forfeiture, if the shareholder is willing to surrender his shares. A surrender and a forfeiture have practically the same effect, the only difference being that the former is done with the assent of the shareholder while the latter is a proceeding *in invitum* **Trevor v. Whitworth**, 12 A. C. 417, 438. But a surrender of shares which are not fully paid up can only be accepted where a forfeiture would be justified. **Bellerby v. Rowland and Marwoods Co.**, (1902) 2 Ch. 14. Where the company pays any consideration for the surrender of partly paid up shares, the surrender is invalid as it amounts to a purchase by the company of its own shares. **Lord Wallscourt's case**, (1899) W. N. 256. Further, every surrender of shares, whether fully paid up or not, involves the reduction of capital which is unlawful except when sanctioned by the Court. Forfeiture is the only exception allowed by the statute where no sanction of the Court is necessary although it involves a reduction of the capital. But if a surrender of fully paid up shares does not result in the reduction of the capital, e.g., if the surrender is in exchange for other shares of the same nominal value it can be accepted without leave of the Court. **Rowell v. J. Rowell and Sons**, (1912) 2 Ch 609. It would, therefore, be clear that a surrender of shares shall be valid only where their forfeiture would be justified and, even if the articles provide for acceptance of a surrender on any other ground, it would be *ultra vires* the memorandum and also constitute a reduction of the capital without the sanction of the Court. **Madras Native Fund v. Natesa Sastri**, 52 Mad. 915; **Collector of Moradabad v. Equity Insurance Co.**, A. I. R. (1948) Oudh 197.

## LIEN

The articles of a company may further provide that the company shall have a first lien on the shares of each member for his debts and liabilities to the company. That provision has the effect of giving a charge to the company over shares of each member to secure any debt which may be due from the member to the company. This charge extends also to the dividends that may be payable on the shares.

Where there is a provision for lien, power is also given by the articles to the company to enforce such lien by sale of the shares. A company cannot enforce such lien by forfeiture of shares as that would amount to foreclosure without an order of the Court. Such power, therefore, if contained in the articles, would probably be void unless the lien is sought to be enforced in respect of the unpaid calls.

A lien of a company is transferable. If the company has a lien on A's share for a debt and A raises the money from B to pay the debt, A may call upon the company to assign its lien to B. *Everitt v. Automatic Co.*, (1892) 3 Ch. 506.

If a shareholder mortgages his shares and the mortgagee gives notice thereof to the company, the mortgagee has a priority over the company if the shareholder incurs a liability to the company after the notice of the mortgage is given to the company. *Bradford Banking Co. v. Briggs*, 12 A. C. 29; *Matheran Steam Tramways Co. v. Lang*, 33 Bom. L. R. 184. But the articles may provide an exemption clause to the effect that the company shall not be bound by or recognize any contingent, future, partial or equitable interest, in the nature of a trust or otherwise, in any share, or any other right in respect of any share, except an absolute right thereto in the person from time to time registered as the owner thereof. In that event, the company will, it is thought, never lose the lien even if it has got the notice of a prior charge. *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302; *Borland's Trustee v. Steel Bros. & Co.*, (1901) 1 Ch. 279; *Societe Generale de Paris v. Walker*, 11 A. C. 20. But in *Mackereth v. Wigan Coal Co.*, (1916) 2 Ch. 293, it was held that, notwithstanding the exemption clause, in disputes between the company and other persons, the company is subject to the ordinary rules of law and equity.

In the case of *Allen v. Gold Reefs*, (1900) 1 Ch. 656, it was held that the death of a shareholder does not destroy company's lien on the shares and it is good even if it is imposed for the first time after his death.

## DIVIDENDS

The Act does not define the term 'dividend' nor does it give any specific power to the companies registered thereunder to declare and pay any dividend.

Dividends are profits of a trading company divided amongst members in proportion to their shares. Such proportion may be determined by the articles; if not, dividends may be paid on each share in proportion to the nominal value of that share without reference to the amount actually paid up thereon *Oakbank Oil Co. v. Crum*, 8 A. C. 65.

The power to pay dividends is inherent in every company, and, therefore, it need not be given by the memorandum or the articles. But the directors may refuse to exercise this power and, in that event, the shareholders cannot insist on the payment of dividends even if the profits are very large unless the directors fraudulently decline to pay them. *Bond v. Barrow Haematite Co.*, (1902) 1 Ch. 353. Where they choose to exercise the power, they are now required by s. 131A (1) to state in their report to be attached to the company's balance sheet the amount which they recommend should be paid by way of dividend. Then the company in general meeting may declare a dividend which should in no event exceed the amount recommended by the directors in their report. This last provision is made in regulation 95 of Table A which is now made applicable to all companies under s. 17 (2).

Besides these dividends, the articles may empower the directors to declare *interim* dividends, i.e., dividends in between two ordinary general meetings of the shareholders of the company.

A dividend becomes a debt from the date on which it is declared or when it is made payable, and a shareholder who is entitled to it can sue to recover it within six years from such date. Such dividend cannot bear any interest unless the articles so provide. An *interim* dividend, however, is not a debt and the directors may pass a resolution to rescind it.

Now, dividends being parts of the profits of a company should be paid only out of such profits and not from the capital. This provision as contained in regulation 97 of Table A, too, is now made obligatory upon every company and shall be deemed to have been contained in its articles. [S. 17 (2)]. There is, however, only one exception to this rule which is laid down in s. 107 of the Act, viz., where shares are issued for raising money to be spent on any construction of work or plant, the company may pay interest out of the capital, even though there are no profits, with the sanction of the Central Government.

In spite of these rules, it is not always easy to determine whether the dividends in a particular case have really been paid out of capital or not. The difficulty arises from the fact that for the purposes of accounts, capital of a company has to be regarded as of two kinds: (1) circulating capital, i.e., property acquired or produced with a view to resell or sell at a profit and, (2) fixed capital, i.e., property acquired and intended for retention and employment with a

view to profit. Now, loss of circulating capital must be accounted for before the profits are ascertained while the loss or depreciation of fixed capital need not be taken into account by means of a sinking fund before profits are paid away. The fixed capital improved in value may be counted as profit. There are numerous cases illustrating the principle with regard to the depreciation of this capital and the effect of those decisions was explained in **Bond's case** (*supra*). In this case, a smelting company lost £200,000 owing to a lease of certain mines of ore becoming useless through flood and £50,000 owing to depreciation of its property generally. It was held that **Verner's case** [(1894) 2 Ch. 239] did not lay down a general rule that in every company fixed capital may be sunk or lost; but that there were companies in which that might be done. The £200,000 loss was a loss of circulating capital, there being no difference between mines of ore and a stock of ore. As to £50,000 loss, the burden of proof was on the directors to show (1) that it was fixed capital, and (2) in a company of that nature such fixed capital may be sunk. **Lee v. Neuchatel Asphalte Co.**, [(1887) 41 Ch. D. 1], it was held, was not an authority for stating that no company owning depreciating property need ever create a depreciation fund.

The result, therefore, is that it is usually legal but not quite safe for directors to pay away profits as dividends without making some provision for making good loss on fixed capital.

It would be clear from the above discussion that there is no principle which compels a company while a going concern to divide the whole of its profits among the shareholders. In fact, dealings with such profits are a part of the management and internal economy. The company may form a reserve fund out of the profits unless the memorandum or the articles otherwise provide. **Evling v. Israel and Oppenheimer Ltd.**, (1918) 1 Ch. 101. Where such a fund is formed, profits credited to the reserve fund nonetheless remain profits and may be paid out as dividends though there is a loss on the capital unless such profits are capitalised. **Re Hoare and Co., Ltd.**, (1904) 2 Ch. 208.

Dividends must be paid in cash unless there is an express authority to pay them in shares or debentures. **Hoole v. Great Western Bail Co.**, 3 Ch. App. 262.

A company instead of paying dividends may capitalize its profits if the articles so permit. The company in such a case declares dividend or bonus out of its undistributed profits and issues at the same time a corresponding number of new shares and then it applies the dividend or bonus which belongs to the shareholders in full payment of the amount due on those shares. The company is thus enabled to increase its capital and the shareholders, on the other hand, get their dividends in the shape of fully paid up shares which are called bonus shares.

Dividends payable on ordinary shares may vary according to the profits made by the company every year; but the dividends on preference shares are fixed by the memorandum or the articles and have to be paid according as such shares are cumulative or otherwise.

Where shares are transferred at or about the time of a declaration of dividend and the transferee is to get the dividend according to the terms of the agreement, the transfer is said to be '*cum dividend*,' if not, '*ex dividend*.' If there is no agreement as to dividends, the buyer is entitled to all dividends declared after the date of the agreement for the sale of shares [*Black v. Homersham*, 4 Ex. D. 24] and, if they are transferred after the declaration of dividend for a particular period, the vendor is entitled to the whole of it though it may be payable in instalments even after the date of the transfer; *In re Kidner's Agreement*, (1929) 2 Ch. 121. A company is, however, bound to pay dividend to its members whose names are registered in its books. It cannot take notice of any private arrangement between the vendor and the vendee of shares in regard to the apportionment as between them of dividend thereon. *The S. A. C. Works, Ltd. v. Sukhdeo*, I. L. R. (1945) All. 15.

## LECTURE IX

### MORTGAGES AND CHARGES

*Borrowing powers—Power to give security—Charge on uncalled Capital—Debentures—Issue of debentures—Re-issue of debentures—Remedies of debenture-holders—Debenture Stock—Floating charge—Book debts—Registration of Mortgages, Charges, etc—Register of Mortgages and Charges—Certificate of registration—Rectification of register of mortgages—Company's register of mortgages, etc.*

#### BORROWING POWERS

The Act does not in terms give to the companies registered under it any power to borrow. But every trading company has an implied power to borrow money for the purposes of its business. *General Auction Estate Co. v. Smith*, (1891) 3 Ch. 432. Where the company is a non-trading one, the power to borrow must be expressed in the memorandum, or the memorandum or the articles must show inferentially that the company is to have such a power. The following observations of Colton, L. J. in *Queen v. Sir Charles Reed*, 5 Q. B. D. 483 at p 488 are very significant:—

"It was said that every corporation, unless restricted by its Act of incorporation, has the same power as an individual to enter into contracts, including that of borrowing money. In our opinion, this contention cannot be maintained. The power of a corporation established for specified

purposes must depend upon what these purposes are, and except so far it has express power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted. A trading corporation stands, as regards an implied power of borrowing, in a very different position."

If, therefore, a company has no express or implied power to borrow, it can only apply to the Court under s. 12 of the Act for getting it, or extending it if its existing power is limited. **Reverisary Interest Society Ltd.**, (1892) 1 Ch. 615.

If a company has an express or implied power to borrow, it may exercise such power to any extent. But the memorandum or the articles may impose limitations upon the exercise of such power, in which event the directors can use the power subject to those limitations. Sometimes, a limitation is imposed that the directors shall not borrow beyond a specified amount except with the sanction of a general meeting, but such a limitation cannot restrict the general power of the company to borrow which, in the absence of anything in the memorandum or articles restricting its power to borrow through agents, can be validly exercised through properly authorised agents. **Mercantile Bank of India, Ltd. v. Chartered Bank, etc.**, (1937) A. E. R. 231. Article 73 of Table A to the Act, which would apply to a company except in so far as it is excluded by the articles of such company, limits the directors' authority to borrow. The requirement of the article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article would not, therefore, be satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. **T. R. Pratt (Bombay), Ltd. v. M. T. Ltd.**, 40 Bom. L. R. 1109 (P.C.).

If a company borrows beyond its powers, the borrowing is *ultra vires* and, therefore, void. The lender in such a case cannot sue the company for the return of the loan. Similarly, where the directors borrow a loan beyond the power given to them for the purpose although the company may have unlimited powers to borrow, the borrowing is *ultra vires* the directors and, therefore, the securities given by them are inoperative unless the company is estopped from alleging their invalidity under the rule in **Royal British Bank's case**, or the shareholders elect to ratify their directors' act. **Irvine v. Union Bank of Australia**, 3 Cal. 280 (P. C.).

In either case, if the money has not been spent, the lender can get an injunction to prevent the company from parting with it, or he may institute a suit against the directors for damages for the breach of an implied warranty of authority. **Weeks v. Propert**, L. R. 8 C. P. 427. If the money has been used in paying off debts which



could have been enforced against the company, the lenders may sue the company as he steps into the shoes of the creditors who have been paid off by virtue of the principle of subrogation. **Neath Building Society v Luce**, 43 Ch. D. 158; **Reversion Fund Co., Ltd. v. Maison Causeway Ltd.**, (1913) 1 K.B. 364,373. But this subrogation does not give the lender the same priority which the original creditors had over the other creditors of the company. **Re Wrexham Railway Co.**, (1899) 1 Ch. 440.

### POWER TO GIVE SECURITY

Where a company has a borrowing power, it has, as an incident of such power, also a power to give security for the debt by a mortgage or charge on all or any of its property, real or personal, present or future, unless expressly prohibited by the articles. **Patent file Co.**, L. R. 6 Ch. App. 83. The money borrowed can be secured in one or more of the following ways:—

- (1) A legal mortgage of specific parts of its property;
- (2) An equitable mortgage by deposit of title deeds;
- (3) A mortgage of chattels,
- (4) A charge on uncalled capital;
- (5) Promissory Notes and Bills of Exchange,
- (6) A floating charge;
- (7) Debentures;
- (8) Debenture Stock; and
- (9) Mortgage of book debts.

### CHARGE ON UNCALLED CAPITAL

A company may charge its uncalled capital if the memorandum or articles allow it or if they contain words wide enough to cover it. **Newton v Debenture Holders of Anglo-Australian Co.**, (1895) A. C. 244. In this case, the memorandum gave power to borrow "on any security of the company." It was held that those words authorised a charge on the uncalled capital. But the mere use of the word 'property' in the instrument creating the charge is not enough to charge the uncalled capital. **Re Russian Spratts Patent Ltd.**, (1898) 2 Ch. 149. The company in this case, in exercise of its borrowing powers, issued debentures charging its undertaking and all property 'to which it now is or shall at any time become entitled.' It was held that the debentures did not cover the uncalled capital.

But a company cannot borrow on the security of its reserve capital nor of its books. The reason is that the reserve capital is not capable of being called up except in the event and for the purpose of the company being wound up, and the books are required to be kept at the company's office and must be open for inspection. **Bartlett v Mayfair Property Co.**, (1898) 2 Ch. 28; **Re Irish Club Co. Ltd.**, (1906) W. N. 127.

A mortgage of uncalled capital is usually enforced by the appointment of a receiver and by an order of the Court giving the receiver power, in case of the company being wound up, to use the name of the liquidator for the purpose of making calls. *Re Westminster Syndicate Ltd.*, (1908) W N. 127.

## DEBENTURES

A 'debenture' is defined in s. 2 (1) (4) of the Act as 'debenture includes debenture stock.' This, in fact, is no definition of the term, and it does not enlighten us as to what it really means. But the Courts and eminent writers have attempted to define this term. Palmer defines it as any instrument under seal evidencing a deed, the essence of it being the admission of indebtedness. The Court of Appeal described it in *Lemon v. Auslin Friars' Trust*, (1926) 1 Ch. 1 as something which was a mere acknowledgment of indebtedness, without containing a charge at all. The new English Companies Act of 1929 in s. 380 defines it as 'debentures, unless the context otherwise requires, include bonds and other securities, of a company, whether they constitute a charge on company's assets or not.' It will, therefore, be observed that a debenture is not more than an acknowledgment of a debt. It need not create a charge nor need it be accompanied by a deed under seal.

In common parlance, however, the word 'debenture' is used to cover many things, but it is generally used to signify a security for money, called on the face of it a debenture, and providing for the payment of a specified sum at a fixed date and a certain rate of interest. It usually gives a charge by way of security and in most cases is one of a series of like debentures. It must be remembered, however, that a creation of a charge is not an essential requisite of a debenture. *Laxman v. Emperor*, A. I. R. (1946) Bom. 18.

There are several kinds of debentures of which the most usual are.—

- (1) Debentures payable to bearer; and
- (2) Debentures payable to registered holder.

As regards (1), the object of making a debenture payable to bearer is that it may become a negotiable instrument which has usually the following incidents:—

- (a) It is transferable by delivery;
- (b) A person who acquires it in due course, *bona fide* and for valuable consideration, gets a good title notwithstanding any defect in the title of the transferor thereof;
- (c) Notice of transfer need not be given to the company; and
- (d) No stamp duty is payable on transfer.

Every debenture of this as well as the other class has coupons for interest attached to it. And, as in the case of share warrants, the interest is payable to the bearer of a coupon, which is only an order

on the company or the company's bank to pay a certain sum to the person who presents it on or after a certain date.

As regards the second class of debentures, they are non-negotiable and are only payable to the registered holders thereof. But they may be transferred in the manner specified in the conditions indorsed on them. Although the debentures of this class are non-negotiable, the coupons for interest attached thereto are negotiable.

#### Contents of debenture

Now, a debenture, though one document, usually consists of two parts. (1) the body of the instrument containing the bond and the charge, and (2) the conditions indorsed thereon.

The conditions generally state that the debenture is one of a series of a certain limited number, each for a like amount of principal, that all the debentures of the series rank *pari passu* as a first or other charge and that such charge (except as regards the property specifically mortgaged by a trust deed, if any,) is to be a floating security and the company is not to create any charge ranking in priority to or *pari passu* with the debentures of the series.

'*Pari passu*' means that all the debentures of the series are to be paid rateably. If, therefore, the security is not enough to satisfy the whole debt secured by the series of debentures, the debentures will abate proportionately. If the words *pari passu* are not used, the debentures rank according to the date of issue and, if they are all issued on the same day, they would be payable according to their numerical order. *Gartside v. Silkstone, etc., Co.*, 21 Ch. D. 762. A company, however, cannot issue a new series of debentures so as to rank *pari passu* with a prior series, unless the power to do so is expressly reserved and contained in the debentures of the prior series.

Besides the *pari passu* clause, a debenture contains conditions regarding the registration of the debentures, the transfer thereof to be delivered to the company, the competence of the company to disregard any notice of equities attaching to the debentures, and the mode of repayment of the principal moneys secured by the debentures.

A debenture also contains a power for the holders of a series of debentures jointly or severally to appoint a receiver themselves without applying to the Court, in case of default in payment of the principal or interest by the company.

#### Debentures with a trust deed

A common form of securing debentures is to execute a deed of trust conveying the property of the company to trustees, declaring trust in favour of debenture-holders, charging other property, and containing *inter alia* provisions regulating the respective rights of the company and the debenture-holders. Where, therefore, a debenture is accompanied by a trust deed, many of the conditions endorsed

on the debenture are embodied in the trust deed, and the security is enforced by the trustees when such occasion arises under the conditions of the deed instead of the debenture-holders themselves enforcing it in like conditions in a case where there is no trust deed accompanying the debentures.

The following are the advantages of having a trust deed:—

(1) if the company makes a default, the trustees are there, ready to take necessary steps, instead of leaving it to the initiative of some debenture-holder;

(2) the trustees may be given power to sell and thus to realise the security without the aid of the Court;

(3) by the deed, the legal estate is vested in the trustees (this prevents a subsequent legal mortgage from getting priority); and

(4) the company can be made to insure, etc., by the covenants in the deed.

### Period of Debentures

Further, debentures may be (1) for a fixed term of years, or (2) payable on demand, or (3) perpetual or irredeemable. In the last case which is contemplated by s. 126 of the Act, the only meaning is that there would be no particular time fixed within which the company would be bound to redeem them. It operates as a restriction on the right of the debenture-holder to demand payment and not on the company which may make the payment whenever it chooses. In the case of such irredeemable debentures, the company undertakes to keep on paying interest thereon at fixed intervals. Therefore, it is no exaggeration to say that such a debenture is not a mortgage at all, but an annuity in perpetuity to the holder.

But all debentures, whether irredeemable or otherwise, become immediately payable on the company going into liquidation, even though for the express purpose of reconstruction or amalgamation, notwithstanding express provisions to the contrary *Re Crompton & Co.*, (1914) 1 Ch. 954. They also become payable when the interest falls in arrears or a receiver is appointed of the property of the company.

### ISSUE OF DEBENTURES

The principle that shares cannot be issued at a discount does not apply to debentures. The reason is that debentures do not form part of the company's capital as they are issued merely to secure moneys borrowed for the purposes of the company. Similarly, interest payable on debentures is a debt and may be paid out of capital. Once the articles give power to the company to issue debentures, it can do so at any time subject to the provisions of s. 98 (1). This power comes to an end only on the company going into liquidation. It may be noted here that a debenture prospectus may be

issued by a company, as such prospectus is contemplated by s. 2 (1) (14) which defines a prospectus.

Under s. 128 of the Act, an agreement to take up and pay for any debentures of a company is made enforceable by a decree for specific performance. Similarly, specific performance of an agreement to give debentures may be enforced against the company. A debenture issued in an irregular manner may be treated as an agreement to issue a debenture. *Re Fire-proof Doors, Ltd.*, (1916) 2 Ch. 142.

In England, it has been held that an agreement to issue debentures creates an equitable charge. Thus, where a company, in consideration of a loan evidenced by a promissory note, also agreed to issue a certain number of second mortgage debentures to the lender when called on, it was held as between the first and some of the second debenture-holders on one hand and the lender on the other that the latter was in equity a holder of the second mortgage debentures to the extent of his debts *Pegge v. Neath & Co.*, (1898) 1 Ch. 183. The question whether a mere agreement to create a mortgage of movable or immovable property amounts in itself to an equitable mortgage under the Indian law was, however, left open by the Bombay High Court in *Maneklal v. Saraspur Manufacturing Co., Ltd.*, 29 Bom. L. R. 253. At any rate, such agreement is capable of being specifically enforced so long as the company is not ordered to be wound up.

## RE-ISSUE OF DEBENTURES

S 127 of the Act confers powers on a company to keep alive for the purposes of re-issue and to re-issue the debentures which have been previously issued and redeemed unless the articles of the company or the conditions of the previous issue of the debentures expressly otherwise provide, or the previous debentures were redeemed under an obligation on the company to redeem. The section does not show how the debentures may be kept alive, but the usual practice is to transfer them to a nominee of the company, and a transfer from such a nominee is a re-issue for the purposes of s. 127. The re-issue may be either by issuing the old debentures or other debentures in their place. The effect of such a re-issue is to entitle the new holders to the same rights and priorities as if the debentures had never been previously issued. Apart from this section, a company may have power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to it by such debentures. Where such power exists, s. 127 does not affect it in any way.

## REMEDIES OF DEBENTURE-HOLDERS

A debenture-holder who wishes to realise his security and get his money back may make use of all or any of the following remedies:—

(1) He may sue on behalf of himself and all other debenture-holders to obtain payment or to enforce his security by sale. This is sometimes called a 'debenture-holder's action.' The Court then appoints a Receiver and also manager, if necessary, for the purpose of the company's business, declares the debentures to be a charge on the assets of the company, directs inquiries as to who are debenture-holders and orders a sale of the property.

(2) He may appoint a Receiver, if the conditions give him power to do so, and if the conditions for the exercise of that power are all fulfilled.

(3) He may apply to the Court for foreclosure of the company's right to redeem the debentures. This remedy is usual, and for its proper exercise it is necessary that all debenture-holders of the company (as distinguished from those of a class) should join in the application. In *Elias v Continental Oxygen Co.*, (1897) 1 Ch. 511, it was held that where the legal estate was in the mortgagees and foreclosure meant simply depriving the mortgagor of his equity of redemption, it was not necessary for all parties to be present; but where it involved conveying the property of the company to the mortgagees, they must all be present. Foreclosure may extend even to the uncalled capital of the company.

(4) He may present a winding-up petition as he is a creditor of the company for the amount advanced by him and interest thereon, but not for any premium to be paid on redemption unless the debenture expressly so provides. *Re Simmer & Jack East, Ltd.*, (1913) W N 41

(5) He may sell the property through trustees if such a power is given by the debenture trust deed.

(6) If the company be insolvent he may value his security, and if found insufficient, prove for the balance of his debt, or give up the security and prove for the whole debt. But he cannot prove for interest which became due after winding-up nor can he get such interest out of his security, when arriving at a balance for which he can prove in the winding-up. If the debenture-holder owes a debt to the company which cannot pay its debentures in full, the holder cannot set off his debt against the liability he owes to the company. The rule is that a person who claims a share of a fund must first pay up everything he owes to the fund. *Re Brown & Gregory, Ltd.*, (1904) 1 Ch 627.

### Receiver

Now a Receiver may be appointed by the Court if:—

(i) the principal moneys have become payable under the conditions of the debenture or the deed, if any; or

(ii) the company is wound up, even though the money is not expressly made payable on such event, and even if the winding-up is merely for the purpose of reconstruction; or

(iii) the security is in jeopardy, e.g., if judgment-creditor has levied execution, or if a judgment remains unsatisfied, or if the company has closed down its business or even one of its chief branches, or if the company proposes to distribute its reserve capital among its members by way of dividend leaving the debentures insufficiently secured. Mere insufficiency of the security, however, does not amount to jeopardy. *In re New York Taxi Co.*, (1913) 1 Ch. 1.

A debenture-holder himself can appoint a Receiver if such power is given to him by the debenture. But the Court may appoint another Receiver so as to supersede the one appointed by a debenture-holder, if it finds that the appointment so made was not for the benefit of all the debenture-holders. *Re Maskelyne Typewriter Co.*, (1898) 1 Ch. 133.

On the appointment of a Receiver, the assets become specifically charged in favour of the debenture-holders, and the power of the company to deal with them in the ordinary course of business ceases, although the company continues to exist until it is wound up. *Moss Steamship Co. v. Whinny*, (1912) A. C. 254. If, however, it seems necessary to carry on the business, the Court usually appoints the Receiver to be a Receiver and Manager. A manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern, but this rule is not inflexible. *Re Victoria Steam Boats*, (1897) 1 Ch. 158.

Now, a Receiver may be authorised by an order of the Court to borrow money to be a first charge on the property of the company in priority to all the debentures, if it is required for the purpose of preserving the business. *Greenwood v. Algeiras Rly. Co.*, (1894) 2 Ch. 205. If the Receiver exceeds the authority, his right of indemnity which has a priority over the claims of the lenders does not extend to the excess, even if he acted *bona fide* unless it was reasonably necessary for him to borrow without applying to the Court. *Re British Power, etc. Co.*, (1910) 2 Ch. 470.

The Receiver when appointed by the Court must give security for the safety of the assets in his hands. If the plaintiff debenture-holder wishes him to act at once, then he must undertake to be responsible until the Receiver gives security.

The surplus of the proceeds of sale by a Receiver after the payment of the principal, interest and costs due to debenture-holders must be paid to the company.

A receiver appointed by the debenture-holders under a power in the debenture is the agent of the debenture-holders, and they are, therefore, liable on his contracts, unless the power to appoint a receiver expressly states that he is to be the agent of the company. On a winding-up the Receiver, if an agent of the company, ceases to be such, but he does not thereby become the agent of the debenture-holders. In either case, he is not personally liable on contracts which he makes. *Gosling v. Gaskell*, (1897) A. C. 575. But a Receiver appointed by the Court is an agent of the Court, and as the Court cannot be liable, he becomes personally liable on his contract. He is, however, entitled to be indemnified out of the assets of the company in priority to the right of the debenture-holders. *Owen v. Cronck*, (1865) 1 Q. B. 265; *London United Breweries*, (1907) 2 Ch. 511. Such Receiver is considered to have been appointed for the benefit of all persons interested in the assets.

## DEBENTURE STOCK

One of the ways in which the company may secure the money borrowed by it is by issuing debenture stock to the lender. The expression 'debenture stock' is not defined by the Act, but s. 2 (1) (4) defines a debenture as 'debenture includes debenture stock.' It means only this that all the provisions of the Act which are applicable to debentures are also applicable to debenture stocks. But it does not say what a debenture or debenture stock is. It has been seen that a debenture is a document evidencing a debt. But debenture stock is a debt itself which is due from a company, and this debt is secured and evidenced by a document called a 'debenture stock certificate.'

Debenture stock is a debt generally secured by a trust deed. It is sub-divisible, but otherwise it is much the same as a debt secured by debentures. The difference between a debenture and debenture stock is very much like the difference between shares and stock. Debenture stock is merely a borrowed capital consolidated in one mass for the sake of convenience. Instead of each lender having a separate mortgage or bond, he has a certificate entitling him to a certain sum, being a portion of one large loan.

A debenture of a series is transferable in full and not in fractional parts, whereas the debenture stock is considered as one debt due to a number of holders which can be transferred in fractional parts by means of the debenture stock certificates according to the multiples agreed upon.



## FLOATING CHARGE

A company in exercise of its borrowing powers can also give a floating charge on its assets. The peculiarity of this charge and the reason why it is called a floating charge is that the company, in spite of the charge, may deal with any of its assets in the ordinary course of business until the charge becomes a fixed charge. The charge is said to be fixed or to crystallize when the money becomes payable under the conditions of the charge and the chargee takes some step to enforce it.

A floating charge is quite distinct from a specific charge. The distinction was pointed out by Lord Macnaghten in *Illingworth v. Houldsworth*, (1904) A. C. 355:

"A specific charge, I think, is one that without more fastens on ascertained and specific property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory, shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

A floating charge is also distinct from a future security. Lord Justice Buckley points out in *Evans v. Rival Granite Quarries*, (1910) 2 K. B. 979:

"A floating security is not a future security, it is a present security which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. The floating security is not a specific mortgage of the assets plus a licence to the mortgagor to dispose of them in course of his business but a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

The characteristics of a floating charge are well defined by Romer, L. J. in *Re Yorkshire Woolcombers' Association*, (1903) 2 Ch. 284 at p. 285, namely, (1) that it is a charge on a class of the company's assets, present and future, (2) that that class is one which in the ordinary course of business is changing from time to time, and (3) that it is generally contemplated that the company may carry on its business in the ordinary way with that class of assets till some (event) occurs on which the charge is to settle down on the property as then existing. *Maheshwari Bros. v. Liquidators, Indian Sugar Mills*, (1942) All. 242. The event contemplated here is any of the events mentioned in the debenture or charge on the happening whereof the moneys secured become immediately payable. It must be carefully noted that the mere happening of such event is not enough to crystallize the charge but the chargee or the debenture-holder must, on the happening of such event, take some step with a

view to realize his security, e.g., get a receiver appointed to enforce his security. It is only then that the charge is said to crystallize or become a fixed charge. It is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. *Birchand v. John Bros.*, A. I. R. (1934) All. 161.

Whether a particular charge is a floating charge or not depends upon the construction of the words used in the document creating the charge. A charge on the 'undertaking' of the company was held to be a good floating charge in *Re Panama Co.'s case*, 5 Ch. App. 318. See also *Pudumji & Co. v. Moos*, 27 Bom. L. R. 1288; *Bank of Baroda v. Shivdasani*, 50 Bom. 547; *J. D. Gomes v. Ranjit Roy*, 54 Cal. 513.

### Postponement of Floating Charge

Creation of a floating charge, therefore, still leaves the company free to make specific mortgages of its property having priority over the floating charge. *Government Stock Co. v. Manila Rail Co.*, (1897) A. C. 81. In this case, the debentures created a floating charge. Three months' interest became due, but the debenture-holders took no steps. The company then made a mortgage of a specific part of its property which was already subject to the floating charge. It was held that the mortgage had priority. The debentures remained merely a floating security until the debenture-holders took some steps to enforce their security.

In spite of the floating charge, the company can, in fact, deal with its property in any way authorised by its memorandum or the articles so long as it remains a going concern. Thus, it has been held that a company may sell the whole of its undertaking if that is one of the objects specified in its memorandum. *Re Borax Co.*, (1901) 1 Ch. 326.

A floating charge is also liable to be postponed to the rights of the following persons if they act before the debenture-holders take any step to enforce the security: (a) a landlord who distrains for rent; (b) a creditor who gets a garnishee order absolute; and (c) a judgment-creditor who attaches goods of the company and gets them sold. If the goods are not sold, and the debenture-holders take action in the meantime, the floating charge has priority. *Davey & Co. v. Williamson & Sons*, (1898) 2 Q. B. 194.

Further, under s. 129, certain other debts, e.g., rates, taxes and wages due to a clerk or a servant of the company, which are entitled to a preferential payment in the event of the company being wound up under s. 230 of the Act, get priority over the claims of the debenture-holders having a floating security although, in pursuance of their having taken steps to enforce their security, a Receiver is ap-

pointed on their behalf or possession is taken by them or on their behalf of any property subject to the floating charge. Where the debentures are secured both by a floating charge and a fixed charge, such priority applies only in respect of assets subject to the floating charge, and not to those subject to the fixed charge. *Lloyds Bank, Ltd. v. The Company*, (1929) 1 Ch. 498; *John v. Suraj Bhan*, (1938) All 869. The same section, however, provides that any payments made in respect of such preferential debts shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

Similarly, a person who has supplied goods to the company under a hire-purchase agreement on the terms that they are to remain the property of the vendor until they are paid for in full has priority over the floating charge. It is immaterial whether such agreement of purchase is made before or after the issue of the debentures giving the floating charge. *Morrison Jones & Taylor*, (1914) 1 Ch. 50.

A clause is frequently inserted in a debenture that the company shall not create mortgages in priority to or *pari passu* with the debentures which are issued. But even in such a case a person who takes a mortgage without notice of the debentures gets priority. Such a mortgage may even be an equitable mortgage by deposit of title deeds. *Re Valletort Steam Laundry*, (1903) 2 Ch. 654. In this case, the debentures contained a floating charge and also a provision that the company were not to create any prior charge. The manager forgot this, and deposited the title deeds with a bank as security. The bank held some of these debentures on deposit for a customer. It was held that the mere possession of the debentures as security for another customer's account did not affect the bank with notice of the conditions of the debentures in their dealing with the company, and that it had priority over the floating charge in respect of the debt owing by the company on the security of the deeds deposited with it.

### **Registration as notice under the Amendment Act**

In cases such as these, the debenture-holders, despite their precaution to secure their priority, received great injustice. The Amendment Act, 1936, now provides an effective safeguard to them by enacting in s 109 (2) that where a mortgage or charge required to be registered under the first part of the section has been so registered, any person acquiring the subject-matter or any share or interest therein of such mortgage or charge shall be deemed to have notice thereof as from the date of its registration.

### **Effect of Floating Charge on Winding-up**

A floating charge remains a floating charge until a winding-up commences, provided the debenture-holders have not taken any step

to crystallize the charge in the meantime. In *re Crompton & Co.*, (1914) 1 Ch. 954. And it is valid as against the general creditors, whether in a winding-up or otherwise. But, under s. 233 of the Act, a floating charge which is created within three months of the commencement of the winding-up of a company is invalid unless it is proved that the company immediately after the creation of the charge was solvent. But, even then, the charge is not wholly invalid. It is valid to the extent of the amount actually paid or to be paid in cash as consideration for such charge, together with interest thereon at the rate of five per cent per annum. Thus, where a floating charge is *bona fide* created within three months of a winding-up partly for securing a past debt, and partly for securing a fresh advance on a separate account, such charge, so far as regards the past debt, is invalid, and so far as regards the fresh advance on separate account, is valid to the extent only of the amount owing on that account at the date of the winding-up order. In *re Hayman Christy & Lilly, Ltd.*, (1917) 1 Ch. 283. The expression 'cash paid' in such a case does not necessarily mean cash paid with no conditions as to the way in which it shall be applied. In *re Mathew Ellis, Ltd.*, (1933) 1 Ch. 458. But where debentures creating a floating charge are issued within three months of the date of the order of winding-up in pursuance of a previous agreement to issue them to secure the loans advanced at the time of the agreement and thereafter, they would not be invalid under this section. In *re Stanton, Ltd.*, (1929) 1 Ch. 180.

### BOOK DEBTS

A company may also create a mortgage or charge on any of its book debts. Book debts are debts arising in a business which in the ordinary course of business would be entered in the books of account of the company, and it is not necessary that they should have been actually entered in the books of account. *Tailby v. Official Receiver*, 13 A. C. 523. Further book debts can be mortgaged or charged and a floating charge thereon can also be created. But a deposit of a negotiable instrument given to a company to secure any book debts for the purpose of securing an advance to the company is neither a mortgage nor a charge on those book debts [s. 109 (1) (iii)].

### REGISTRATION OF MORTGAGES AND CHARGES

S. 109 of the Act does not require all mortgages and charges to be registered with the Registrar of Companies. It specifies six kinds of mortgages and charges which are required to be compulsorily registered. They are:—

- (a) a mortgage or charge for the purpose of securing any issue of debentures;
- (b) a mortgage or charge on uncalled share capital of the company;

- (c) a mortgage or charge on any immovable property wherever situate, or any interest therein;
- (d) a mortgage or charge on any book debts of the company;
- (e) a mortgage or charge, not being a pledge, on any movable property of the company except stock-in-trade; and
- (f) a mortgage or charge on the undertaking or property of the company.

A mortgage, charge or pledge which does not fall within these provisions does not require registration. It may be noted here that the wording of clause (e) above clearly contemplates a mortgage which may also be a pledge, and, therefore, registration under the section would not be necessary where the person entitled to security has obtained possession of the goods. In *re East Africa Hardware Co.*, 51 Bom. L. R. 271. For instance, where a bank indorses to its creditor as security promissory notes drawn in its favour by its debtors and delivers them to the creditor entitling him to realise the securities as and how he pleased, the transaction though amounting to mortgage amounts to a pledge and, therefore, does not require registration. *T. Radhakrishnan Chettiar v. The Official Liquidator*, A. I. R. (1943) Mad. 73.

What is required to be filed with the Registrar for the purposes of registration in all these six cases is the prescribed particulars of the mortgage or charge together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof duly verified. The period for filing these particulars is 21 days after the date of its creation.

The new s. 109A now requires similar particulars to be filed where a company acquires any property which is subject to a charge of any one of the kinds mentioned above within 21 days of the acquisition.

S. 110 provides an alternative mode of registration in cases where a series of debentures containing or referring to an instrument containing a mortgage, to the benefit of which the holders of that series are entitled *pari passu*, is created by a company. It shall be sufficient in these cases if, within 21 days after the execution of the deed, or if there is no deed, after the execution of any debentures of the series, there are filed with the Registrar the following particulars:—

- (1) the amount secured by the series;
- (2) the date of the resolution authorising the issue of the series, and the date of the covering deed (if any) by which the security is created or defined;
- (3) general description of the property charged;
- (4) names of trustees (if any) for the debenture-holders; and
- (5) the deed (or a copy duly verified) containing the charge or, if there is no such deed, then, one of the debentures of the series.

When more than one issue is made of the debentures of a series, the particulars of the dates and amounts of each issue shall be filed with the Registrar, but omission to do this will not affect the validity of the debentures themselves.

Under s. 111, a further particular is required to be filed with the Registrar as regards the amount or rate of commission, allowance or discount that may have been directly or indirectly paid by the company to any person in consideration of his taking up or agreeing to take up or procuring or agreeing to procure subscription for any debentures. Omission to do this, however, will not vitiate the issue.

#### Effect of non-registration

If a mortgage or a charge which requires to be registered under s. 109 is not so registered, the effect is to avoid it as against the liquidator and creditors of the company. But it is quite good as against the company, and the company may give a subsequent valid mortgage to secure the same debt. Although a security becomes void by reason of non-registration, it cannot affect the contract or obligation of the company to repay the money thereby secured. In fact, s. 109 provides that, in such a case, the money becomes immediately payable and the company cannot repudiate it on the ground of non-registration. Where, however, letters of hypothecation create a floating charge which ought to be registered, but is not registered, but upon seizure, before the liquidation of the company, under the licence to seize, a specific charge comes into existence perfected by the seizure of the goods, the seizure is valid as against the liquidator. *Mercantile Bank of India, Ltd. v. Chartered Bank, etc.* (1937) A. E. R. 231. In this connection, it is important to notice the distinction that what avoids the charge is not the lack of registration but the neglect to send in the particulars. The validity of the charge does not depend on the date on which the Registrar chooses to make the necessary entry in the register. The section is complied with if the particulars of the charge are submitted within 21 days from the date of the execution of the charge. When this has been done, the mere fact that the registration was allowed to stand over for a period of over two years owing to some outstanding disputes about the fees would not destroy the security. *Benares Bank v. Bank of Bihar*, A. I. R. (1947) All. 117.

#### REGISTER OF MORTGAGES AND CHARGES

S. 112 of the Act requires the Registrar to keep a register, in respect of each company, in the prescribed form of all mortgages and charges created by the company requiring registration under s. 109, and to enter therein the date of creation of each mortgage or charge, the amount secured thereby, short particulars of the property and the names of the mortgagees or persons entitled to the charge. Such register shall be open to inspection to the public on payment of fee

not exceeding one rupee. The Registrar is also required to keep a chronological index of the mortgages and charges registered by him (s. 113).

### CERTIFICATE OF REGISTRATION

It may be noticed that the primary duty is of the company to get a mortgage or charge or any modification of a charge already registered, registered under the Act. On the failure of the company to get it registered, any person interested therein can cause the same to be registered, and recover the fees paid by him for that purpose from the company (s. 116).

On registration of a mortgage or charge, the Registrar gives a certificate stating the amount secured, and such certificate is conclusive evidence that the requirements of ss. 109-112 as to registration have been complied with (s. 114). Thus, where an instrument creating a mortgage of a leasehold factory with all the movable plant used in or about the same was registered by the Registrar as a mortgage of the leasehold premises (without any mention of the chattels), and a certificate of registration was issued, it was held that the certificate was conclusive evidence that the mortgage or charge created by the instrument (whatever it was) was registered, and that the mortgage of chattels must be deemed to have been duly incorporated in the registration. *National Provincial Bank v. Charnley*, (1924) 1 K. B. 431.

The certificate of registration is required to be endorsed on every debenture or certificate of debenture stock issued by the company and the payment of which is secured by a mortgage or charge so registered (s. 115).

### RECTIFICATION OF THE REGISTER OF MORTGAGES

It may be observed here that the Court may extend the time for registration of a mortgage or charge on a proper cause being shown. Where such order is made it shall not prejudice any right acquired in respect of the property concerned prior to the date of actual registration. S. 120 (2); *Lala Ramnarain v. Radhakishen*, 32 Bom. L. R. 544 (P. C.). Similarly, it may, on the application of the company or any person interested, order an omission to register or to give intimation to the Registrar of the satisfaction of the mortgage debt, or a misstatement in the register of the Registrar to be rectified on such terms as to costs as it thinks fit, if it is satisfied that the omission or misstatement was caused by accident or inadvertence, that it is not of a nature to prejudice the position of the creditors or shareholders or that on other grounds it is just and equitable to make the order of rectification (s. 120).

## REGISTRATION OF SATISFACTION

S. 121 of the Act is replaced by a new section under which it is the duty of the company to give intimation to the Registrar of the payment or satisfaction of a charge or mortgage requiring registration under the Act within 21 days. The Registrar should thereupon send a notice to the mortgagee calling upon him to show cause within not more than 14 days why the satisfaction should not be recorded. If no cause be shown, the Registrar should order that a memorandum of satisfaction be entered on the register and should also furnish a copy thereof to the company if required. Where cause is shown, he should record a note to that effect instead, and inform the company about it.

## REGISTRATION OF APPOINTMENT OF RECEIVER

Every appointment of a Receiver is to be notified to the Registrar within 15 days of the appointment for the purpose of entering the fact of such appointment in the register maintained by him under s 112 (*supra*). In case of default, the penalty is a fine not exceeding Rs. 50 a day. The Receiver is to file every six months while in possession an abstract of the receipts and payments during the period to which the abstract relates. On ceasing to act as such, he is to give notice to the Registrar who enters the fact in the register. In case of default, the penalty is a fine not exceeding Rs. 500. Besides, every document bearing the name of the company should contain a statement that a Receiver has been appointed. (Ss. 118-119).

## COMPANY'S REGISTER OF MORTGAGES AND CHARGES

A company is also required to keep its own register of mortgages and charges and enter therein all necessary particulars thereof (s. 123). This and the copies of mortgages and charges which a company is required to keep at its registered office (s. 117) shall be open to inspection of any creditor or member without fee. The register will be open to outsiders for inspection on payment of a fee not exceeding one rupee as the company may prescribe. On default, not only the company and every officer party thereto shall be liable to a fine, but the Court may also compel immediate inspection of the required documents. Similarly, the register of debenture-holders shall be open to inspection of every registered debenture-holder of the company subject to such reasonable restrictions as the company may in general meeting impose. Copies or extracts from the register may be had by members on payment of proper fee, and so also of the trust deed. (Ss. 124 and 125).



## LECTURE X

## DIRECTORS AND MANAGING AGENTS

*Directors — Appointment — Qualification — Disqualification — Vacation of Office — Removal — Remuneration — Position — Powers and Disabilities — Proceedings — Liabilities — Criminal Liability — Register of Directors, Managers and Managing Agents — Managing Agents — Term of Office — Removal and other Disabilities — Loans to Managing Agents — Contracts with the company — Restriction on powers — Restraint on Business Engagements — Remuneration — Restrictions on Companies under the same management.*

## DIRECTORS

Directors are the mainspring of a company occupying a very important position in all its affairs.

Ss. 83A to 87 of the Act deal with the appointment, removal and vacation of office of directors and the nature of their position in relation to a company's affairs. The Amendment Act, 1936, has introduced ss. 86A to 86I which, as will be presently noticed, deal with the position of directors in greater detail than before.

## APPOINTMENT

Every company except a private company registered under the Act was, prior to the amendment, required to have at least two directors, but, now under the amended s. 83A, every such company must have at least three directors. The newly added sub-sec. (2) of s. 83B, however, provides that, so far as companies other than private ones registered after the Amendment Act came into force, notwithstanding anything contained in their articles, not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement in rotation. On the other hand, s. 87I provides that, notwithstanding anything contained in the articles of a company other than a private company, the directors, if any, appointed by the managing agent shall not exceed one-third of the total number of directors.

The first directors of a company are usually named in its articles; otherwise, the subscribers to the memorandum are deemed to be the directors till the first directors are appointed.

The mode of appointing first directors where no such directors are mentioned in the articles, and of the subsequent appointments of directors is generally specified in the articles. If no provision is made, the company can appoint them at a general meeting and, in case of a casual vacancy, it may be filled up by the continuing directors and the persons so appointed would be subject to retirement at the same time as if the vacancy had not occurred [s. 83B (1)]. A casual vacancy means one occurring by death, resignation or bank-

ruptcy, and not by efflux of time. *Shrinivasan v. Watraj*, 61 M. L. J. 724.

The Act requires that before any person is appointed a director or is named as such in the articles, prospectus or a statement in lieu of prospectus he must file with the Registrar a consent in writing to act as a director and secondly, subscribe the memorandum for, or sign and file with the Registrar a contract in writing to take from the company, a number of shares not less than the qualification shares (if any) as may be fixed by the articles or make and so file an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name [s. 84 (1)].

Further, a list of persons consenting to act as directors must be filed with the Registrar together with an application for registration of the memorandum and articles (if any) for the purpose of the incorporation of the proposed company [s. 84 (2)]. The provisions of these two sub-sections, however, do not apply to a private company or to a company which was a private company before it became a public company [s. 84 (3)].

It will, therefore, be obvious that a proposed director has to comply with the above requirements before he becomes eligible for the appointment.

### QUALIFICATION

The matter, however, does not rest there. A company cannot commence its business until the directors have taken up and paid for their qualification shares in cash in the same proportion as the public have to pay on application and allotment [s. 103 (1)]. Further, a director must do so within two months of his appointment or such shorter time as may be fixed by the articles. If he fails to do so, he becomes disqualified and cannot act as a director (s. 85). If he does act as a director, the company may restrain him from doing so by injunction but cannot sue him for damages. By so acting, whatever wrong is done is done to the company and, therefore, an individual shareholder cannot take any proceedings against such disqualified director. This is the rule in *Foss v. Harbottle*, 2 Hare 461. The only exception to this rule is where the persons against whom relief is sought hold the majority of shares and will not allow the company to bring an action. Even in such a case, a shareholder cannot sue unless the act complained of is fraudulent or *ultra vires* and not merely informal. *Burland v. Earle*, (1902) A. C. 83. But, apart from this, s. 86 of the Act definitely lays down that acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification, but the acts of such a director, after his appointment is shown to be invalid, shall cease to have validity. The effect of this section is far reaching as the acts of a *de facto* director will not only bind the outsiders and

the company, but also the company and its members, and the members *inter se*. **British Asbestosh Co. v. Boyd**, (1903) 2 Ch. 439. It may, however, be noted that this section which corresponds to s. 143 of the English Companies Act was designed as machinery to avoid questions being raised as to the validity of transactions when there has been a slip in the appointment of a director and not to override substantive provisions relating to such appointments. It cannot apply when there is no appointment as directors at all and their acts cannot be validated. **Morris v. Kansoen**, L. R. (1946) A. C. 459.

Where the qualification of the directors is fixed by the articles and not governed by clause 70 of Table A which provides that the qualification of a director shall be the holding of at least one share, it must be disclosed in the prospectus.

It must be borne in mind that a director has to hold his qualification 'in his own right'. Therefore, a director may hold such shares as a 'trustee for others' provided that it does not appear on the register that he is a trustee. **Pulbrook v. Richmond Consolidated Co.**, 9 Ch. D. 610. Shares which are held by a director jointly with any other person may be a sufficient qualification. **Grundy v. Briggs**, (1910) 1 Ch. 444. If, however, a director takes his qualification shares as a present from the promoters, it amounts to a breach of trust, and he must account to the company for the amount. **Hay's case**, (1875) 10 Ch. App. 593. The reason is that every director under the Act has to pay for his qualification shares.

### DISQUALIFICATION

It has been stated that a director must take up his qualification shares (if any) within two months of his appointment, otherwise he becomes disqualified to continue as a director (s. 85). Secondly, he must not be an undischarged insolvent. S. 86A imperatively provides that a person who is an undischarged insolvent shall not act as a director, managing agent, or a manager of a company. If he does act, he shall be liable to imprisonment for a term not exceeding two years or to a fine to the extent of Rs. 1,000, or both.

### VACATION OF OFFICE

The grounds for the vacating of a director's office which used formerly to be stated in the articles are now provided by the new s. 86I. They are:—on the director (i) failing to obtain within time or ceasing to hold his share qualifications, if any, (ii) becoming of unsound mind, (iii) being adjudged an insolvent, (iv) failing to pay calls within six months from the date of the calls, (v) accepting or holding either himself, or the firm of which he is a partner or any private company of which he is a director, any office of profit under the company without the sanction of the company in general meeting other than that of a managing director or manager or legal or

technical adviser or a banker, (vi) absenting himself from three consecutive meetings of the directors or from all the meetings of directors for a continuous period of three months, whichever is the longer, without leave of absence from the board of directors, (vii) accepting for himself, or the firm of which he is a partner, or any private company of which he is a director, a loan or a guarantee from the company in contravention of s. 86D (*infra*), and (viii) acting in contravention of s. 86F (*infra*).

This section, however, leaves full liberty to a company to provide additional grounds by its articles if it so chooses.

## REMOVAL

A company is also given power under the new s. 86G to remove by extraordinary resolution any director whose period of office is liable to determination at any time by retirement of directors in rotation before the expiration of his period of office and to appoint by ordinary resolution another person in his stead who, of course, would have to retire at the same time as his predecessor would have done. The section does not state any reasons for which the power is to be exercised and, therefore, it would seem that a company can exercise this power whenever it finds a director unsatisfactory or otherwise undesirable. The articles need not specify the circumstances in which this power can be exercised.

In cases, however, where a director is not subject to retirement by rotation, the articles may provide for his removal in such circumstances as the company may deem proper if the conditions of the appointment of such director so permit.

## REMUNERATION

The remuneration of a director is usually provided by the articles or there may be an express agreement for that purpose as between the company and the director. At any rate, the remuneration must be stated in the prospectus, and the directors are not entitled to any remuneration apart from the express agreement or what may have been fixed by the articles.

If the articles provide for the remuneration, it becomes a debt for which the directors may sue the company. It may also be paid out of capital if there are no profits. *Re Lundy Granite Co.*, 26 L. T. 673. However, the directors may agree to waive their remuneration if they find that the company does not make any profits. There is sufficient consideration to support such an agreement if the several directors mutually agree to waive their claims.

The remuneration may be fixed at the rate of certain amount a year; or it may be 'a yearly sum of Rs. . . . , or 'Rs. . . . . per annum.' In the first case, a director who acts for part of a year is entitled to a proportionate share of the remuneration fixed while, in the latter two cases, he is entitled to nothing unless he acts for

the whole year. **Inman v. Acroyd and Best, Ltd.**, (1901) 1 K. B. 613. This decision has been doubted in another case on the ground that the remuneration in such a case appears to be apportionable under the Apportionment Act, 1834. **Diamond v. English Sewing Cotton Co.**, (1922) W. N. 237.

### POSITION OF DIRECTORS

It is really difficult to define the position of directors. To some extent they are trustees for the company, and to a certain extent they are also its agents. In any case, they stand in a fiduciary position towards the company in regard to the powers conferred on them by the articles and also the capital under their control. **Legal Remembrancer, Bengal v. Akhil Bandhu Guha**, (1937) 1 Cal. 328. They are not persons in the employment of the company. Any agreement, therefore, to pay an annuity to the widow of a director is *ultra vires* the company as being neither incidental to the business nor for the benefit of the company. **In re Newmann & Co.**, (1895) 1 Ch. 674; **Lee, Behrens & Co., In re**, (1932) 2 Ch. 46.

As regards their position as trustees, it must be borne in mind that they are trustees for the company and not for the individual shareholders. **Perceival v. Wright**, (1902) 2 Ch. 421. Directors in this case bought shares from a shareholder while they were negotiating for the sale of the company at a very high price, but did not tell him of this fact. It was held that the purchase of the shares was good. Nor are they trustees for third parties who have made contracts with the company. **Bath v. Standard Land Co.**, (1911) 1 Ch. 618.

Now, the directors are trustees for the company in respect of their power of approving transfers, issuing and allotting shares, making calls and forfeiting shares. - A reference has been made to this matter in the lecture on Shares in detail. It may be added here that s. 10 of the Limitation Act does not apply to directors. **Kathiawad Trading Agency v. Virchand Dipchand**, 18 Bom. 119.

As regards their position as agents for the company, they may make contracts on behalf of the company and they will not be liable in respect thereof unless they are made in their own name. In this latter event, the other party can either sue the company or the directors or both, at his option.

If a contract made by the directors is *ultra vires* themselves, then such contract, if made with a member, is only voidable; and, if made with an outsider who had no notice of the want of powers, binds the company. In either case, however, it may be made valid by the acquiescence of the shareholders.

If the contract is *ultra vires* the company, it does not bind the company, and the directors themselves are not liable on it except sometimes for breach of an implied warranty of authority. **Weeks v. Propert**, 8 C. P. 427.

It will, therefore, be noted that directors, though holding a position of trust in relation to the company, are neither trustees nor agents of the company exclusively. Jessel, M. R. explains their real position in *Re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450, in these words:—

"Directors are described as trustees, agents or managing partners, not as exhausting their powers or responsibilities but as indicating useful points of view. It does not matter much what you call them, so long as you understand what their true position is, which is that they are commercial men, managing a trading concern for the benefit of themselves and all other shareholders in it."

### POWERS AND DISABILITIES OF DIRECTORS

Powers of directors are generally contained in the articles and there is usually a clause giving them powers of management and all the powers of the company which are not otherwise dealt with. This general clause is, however, not to be construed *ejusdem generis* but it has been held to cover and render valid all acts of the directors done *bona fide* in the management of the company. *Re Pyle Works* (No 2), (1891) 1 Ch 173.

Whenever necessary, it is within the competence of shareholders to enlarge the powers of directors and, if the directors exceed their powers, they can ratify their acts. But such acts must be within the powers of the company, otherwise, they would be *ultra vires* the company and, therefore, not capable of being ratified. In any event, no director including a managing director can be empowered to represent a limited company in a Court of law. *Frinton v Walton, etc.* Mineral Co., (1938) 1 A E R 649.

The Amendment Act, 1936, has introduced a number of sections with a view to impose such disabilities upon directors as tend to render their position more compatible with the interests of the company. Prior to the Amendment Act, it was entirely in the discretion of the company to formulate any such disabilities in its articles but, in most cases, directors enjoyed almost an unlimited power to deal with the company in their own interests in any manner possible. Eventually, the system led to a number of abuses of such power and the Legislature has now intervened to impose the necessary restrictions in that behalf.

Under the new provisions, the following disabilities have been prescribed:—

(i) As already noticed, an undischarged bankrupt cannot act as director or in any way take part in the management of a company. The company here includes a foreign company having an established place of business within British India (S. 86A). This section is based on s 142 of the English Act.

(ii) A director or manager, even if authorised by the articles or by an agreement in that behalf, cannot assign his office as such to

another person. Such assignment, if made, shall be of no effect unless it is approved by a special resolution of the company. (S. 86B). This provision follows s. 161 of the English Act. It is, however, provided that the exercise of the power of a director to appoint a substitute for himself during his absence of not less than three months from the district in which board meetings are ordinarily held shall not amount to an assignment of office if done with the approval of the board.

(iii) A director, manager, officer or auditor of a company shall not be entitled to claim any exemption from or indemnity against any liability, which by virtue of any rule of law would attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company, by reason of any provision contained in the articles or in any separate contract with the company. Such provision wherever contained shall be void, and any such provision in the case of a company existing at the date of the commencement of the Amendment Act, 1936, shall cease to operate and be void on the expiration of six months from that date. No person, however, shall be deprived of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force. A company, however, is at full liberty in pursuance of any such provision to indemnify any such director manager, officer or auditor against any liability incurred by him in defending any legal proceedings in which he has succeeded, or in connection with any application under s. 281 in which relief is granted to him by the Court (S. 86C). This section follows s. 152 of the English Act.

(iv) No company shall make or guarantee any loan made to any of its directors or to a firm of which he is a partner or to a private company of which he is a member or a director. In the event of any contravention of this provision, any director of the company who is a party thereto shall be liable to a fine to the extent of Rs. 500 and shall be jointly and severally liable for the amount unpaid in case of default of repayment of the loan or in discharging the guarantee. These provisions, however, do not apply to a banking company or to a private company unless it is the subsidiary company of a public company. [S. 86D].

(v) No director or firm of which he is a partner or private company of which he is a director can hold any office of profit under the company except that of managing director, or manager or a legal or technical adviser or a banker unless the company in general meeting gives its consent thereto. This disability does not apply to a director elected or appointed before the commencement of the Amendment Act in respect of any office of profit held by him at the commencement of the said Act. The office of managing agent, however, does not fall under the section. [S. 86E].

(vi) The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company in general meeting, sell or dispose of the undertaking of the company, or remit any debt due by a director. [S. 86H].

### PROCEEDINGS OF DIRECTORS

The directors must act at a meeting of themselves called the board meeting. But they cannot proceed with such meeting unless the requisite quorum of fully qualified directors is present. The meeting, otherwise, is bad and proceedings thereof are liable to be vitiated. The procedure at the meeting is to pass resolutions on matters coming before them for consideration, and such resolutions are entered in a minute book which is to be signed by the chairman present at the meeting. It has been, however, held that the rule of corporation law, namely that when a duty is delegated to a body of persons, those persons can act at a meeting by a majority, has no application to companies incorporated under the Companies Act and, therefore, the powers conferred on directors by the articles must be exercised by all of them unless the articles otherwise provide. Accordingly, where two of the three governing directors of a company appointed by a resolution additional directors against the wish of the third governing director, the resolution was held to be invalid *Perrott and Perrott v. Stephenson*, (1934) Ch. 171. The relevant article in this case did not provide for decisions by a majority of directors. The correct view, however, seems to be, as recently held by the Lahore High Court, that the aforesaid rule of corporation law would apply to companies incorporated under this Act unless a construction of the articles leads to the conclusion that there was an intention to supersede the same. *Ganesh Flour Mills Co. Ltd. v. Jagmohan Saran*, 24 Lah. 123.

### LIABILITIES OF DIRECTORS

Ordinarily, the liability of directors for payment of the debts of a company is limited in the same way as that of the members of the company. There is nothing in the Act, however, to prevent their liability being made unlimited by the memorandum of a company, or, if limited by the memorandum, being converted into an unlimited liability in pursuance of the authority given by the articles.

Where their liability is unlimited the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited (s.70).



Where, on the other hand, their liability is limited, the company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of all its directors or any director. This alteration of the memorandum, however, which is the sixth case in which a memorandum can be altered (p. 26) does not need to be sanctioned by the Court, and it would be as effective as if it had been originally contained in the memorandum (s. 71).

In respect of their office, directors may be liable, firstly, to the outsiders who have dealings with the company and, secondly, to the company itself.

#### (a) To outsiders

As regards their liability towards outsiders, they are not personally liable on the contracts which they make as agents for the company unless they are made in their own name. In the latter event, the other party to the contract has an option to sue the company or the directors or both. Where the contract is *ultra vires* the company, it is not binding on the company, but that does not mean that the directors are liable on it, the reason being that the other party to the contract is deemed to have notice of the powers of the company in regard to making of contracts as contained in the memorandum and the articles. With such notice, he is in law deemed to know that a particular contract is *ultra vires* the company and, therefore, he cannot sue on such contract. But, apart from this, it has already been seen that directors may be liable on such *ultra vires* contracts for breach of an implied warranty of authority. Where, for instance, moneys are borrowed beyond the powers of the company, the borrowing is *ultra vires* and void, and the securities given are also void. The lender in such a case cannot sue the company for the return of the loan on the basis of the transaction. But he may sue the directors for breach of warranty implied from the prospectus that they had power to issue such debentures. *Weeks v. Property*, 8 C.P. 427. Where, however, the contract is *ultra vires* the directors, it binds the company if the other party had no notice of the want of powers on the part of the directors.

Similarly, as stated earlier, directors are liable to such outsiders who have subscribed for shares on the faith of false statements in a prospectus. This liability may be enforced under s. 100 by an action for damages, under s. 97, or by an action in deceit under the general law.

#### (b) To the company

As regards their liability towards the company, it may arise (1) where they have acted in an *ultra vires* manner, (2) where they are guilty of negligence, (3) from breach of trust, and (4) from misfeasance.

(1) Directors are liable to the company in respect of their *ultra vires* acts, and it is not necessary to prove fraud in such cases, e.g., when they pay dividends out of capital. But s. 281 of the Act gives a wide protection to the directors, and it has been held that such protection extends even to cases of *ultra vires* acts if the Court finds that they have acted honestly and reasonably and ought fairly to be excused. In that view of the matter, the Court would relieve them, either wholly or partly, from their liability on such terms as it might think proper. *Claridge's Patent Asphalt Co., In re*, (1921) 1 Ch. 543.

(2) Under the new s. 86C, directors are liable to the company even for simple negligence. When they act within their powers, they will not be liable for mistakes or errors of judgment which may cause loss to the company, provided they act *bona fide* and for the benefit of the company and with such care as may be reasonably expected from them. *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, (1899) 2 Ch. 392. The burden of proving bad faith in such a case is on the person who challenges the acts of the directors. But if they are guilty of negligence, they would be liable, even if the articles otherwise provide.

Before the Amendment Act, the articles usually contained a clause exempting the directors from liability in respect of acts of default and negligence. Therefore, whether a director was liable to the company for any negligence or otherwise was entirely governed by the articles. S. 281 of the Act gave protection only when a director was found liable outside the exemption clause and then only the question was considered by the Court whether the director should be excused or not. The authority for the proposition that the liability of a director was governed by the exemption clause in the articles was *Re City Equitable Fire Insurance Co.*, (1925) Ch. 407. But, now, the Amendment Act removes this protection under the articles and leaves them to the only relief under s. 281.

A director is negligent if he fails to perform his duty to the company. Duties of a director as explained by Romer, L. J., in *Re City Equitable Fire Insurance Co.* (*supra*) may be noted at this stage:

"The manner in which the work of a company is to be distributed between the board of directors and the staff is a business matter to be decided on business lines. The larger the business carried on by the company the more numerous and more important matters that must of necessity be left to the managers, the accountants and the rest of the staff. In ascertaining the duties of a director of a company it is necessary to consider the nature of the company's business and the manner in which the work of the company is reasonably in the circumstances and consistently with the articles of association, distributed between the directors and the other officials of the company.

"In discharging these duties, a director (a) must act honestly, and (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the

circumstances, on his own behalf, (c) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (d) he is not bound to give continuous attention to the affairs of the company; his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds of suspicion, justified in trusting that official to perform such duties honestly."

Following this decision, it has been recently held in this country that in respect of all duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. A director is also not bound to examine entries in the company's books. *D. Doss v. C. P. Connell*, (1938) Mad. 292, *Hallmark's case*, 9 Ch. D. 322; *Denham & C., In re*, 25 Ch. D. 752; *Dovey v. John Cory*, (1901) A. C. 477.

(3) & (4) A director is also liable for a breach of trust, e.g., for secret profits or misapplication of the funds of the company. In this case also, the protection offered by s. 281 can be extended. He is also liable for misfeasance, i.e., a breach of duty which causes loss to the company. Misfeasance is something more than negligence. It also constitutes a breach of trust. Where the directors apply the company's property for their own benefit they are guilty of breach of trust as well as duty towards the company inasmuch as the company does not receive the protection to which it is entitled. *E. B. M. Co. Ltd. v. Dominion Bank*, A.I.R., (1937) P.C. 279. In such a case, the company as a whole, while a going concern, can file a suit for damages against the director concerned. If the company is in the course of winding up, the remedy is by way of a misfeasance summons under s. 235 taken out within three years from the date of the first appointment of a liquidator, or the date of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer. Such summons may be taken out at the instance of the liquidator, a creditor or a contributory praying that the Court should inquire into the conduct of any past or present director or manager or any other officer of the company who appears to have misapplied, retained or become accountable for any money or property of the company or who appears to be guilty of misfeasance or breach of trust in relation to the company, and order him to replace the moneys misapplied or to pay compensation. Proceedings under s. 235, however, cannot be continued against the heirs of a deceased director. *Sankaram v. Kottayam Bank*, A. I. R. (1946) Mad. 304.

#### CRIMINAL LIABILITY OF DIRECTORS

The Act itself imposes penalty upon the directors for omitting to comply with certain provisions of the Act, e.g., s. 31 penalises the

omission to keep a register of members. See ss. 32, 51, 76, 82, 87, 104, 108, 124 and several others for these penal provisions

### REGISTER OF DIRECTORS, MANAGERS AND MANAGING AGENTS

The Amendment Act, 1936, substitutes entirely a new section for old s. 87 of the Act and requires every company to keep at its registered office a register of its directors, managers and managing agents containing their names in full with former names or surnames, if any, addresses, nationality of origin and the business which each of them is doing. In the case of a corporation, the register should set out its corporate name, situation of its registered office, and the full name, address and nationality of each of its directors. In the case of a firm, it should contain the full name, address and nationality of each partner, and the date on which each became a partner.

The company must send to the Registrar a return in the prescribed form containing the above particulars as mentioned in the register and a notification of any change among its directors, managers or managing agents or in any of the particulars within fourteen days from the appointment of the first directors, managers or managing agents or from the change, as the case may be.

The register should be open to inspection at least for two hours on each working day by every member of the company free of charge and by any other person on payment of one rupee or any sum less than a rupee as the company may prescribe.

In case of default in respect of any of these three requirements the company and every officer who is a party thereto shall be liable to a fine of Rs 50. Besides, the Court will have power to compel an immediate inspection where it is refused.

### MANAGING AGENTS

The Amendment Act, 1936, further introduces a series of sections dealing with managing agents. Provisions enacted in these sections do not appear in the English Act and it may be said that they are necessitated in this country by reason of its peculiar trade conditions.

S 2(1)(9A) defines a managing agent as a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement. He differs from a manager which term is defined in s 2 (1) (9) in that, though the latter has a similar management in his hands, whether under a contract of service or not, there is no agreement between him and the company entitling him to the management. A director may also be the manager of a company.

## TERM OF OFFICE

S. 87A fixes the term for which a managing agent may be appointed to a maximum period of twenty years, and further provides that a managing agent appointed before the commencement of the Amendment Act, 1936, shall in any event cease to hold office on the expiry of twenty years from the commencement of the Act, unless he is reappointed thereto on or before the expiry of the said twenty years. This latter provision, however, as regards an existing managing agent shall not operate so long as all moneys payable to the managing agent for loans made to or remuneration due upto the date of such termination from the company are not paid off. Further, the managing agent upon termination of his office shall be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by him on behalf of the company subject to existing charges and encumbrances, if any. It may be noted that these privileges are only allowed to an existing managing agent as though it were a sort of compromise between the vested interests of the existing managing agents and the policy of the legislature to check the abuses of the system of managing agency in all possible ways. As regards the managing agents to be appointed after the commencement of the Amendment Act, 1936, they will have the office for clean twenty years at the end of which they shall have to retire although the company may be indebted to them for loans made to it or their remuneration. Nor will they have any charge upon the assets of the company by way of indemnity as is made available to existing managing agents. The section, however, does not bar their re-appointment as managing agents, but that would require the sanction of the company in general meeting and a separate contract.

## REMOVAL AND OTHER DISABILITIES

S. 87B provides for the removal of managing agents, controls the transfer of their office, prohibits assignments of their remuneration and gives the company certain powers of control over them.

A company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of a non-bailable offence in relation to the company's affairs punishable under the Penal Code. If the offender is a member of a firm or a director of a company which is the managing agent concerned, this provision as to removal shall not apply if he is dismissed by the managing agent within 30 days from the date of his conviction, or if his conviction is set aside in appeal.

Secondly, the office of a managing agent shall be vacated if he is adjudged insolvent.

Thirdly, a transfer of his office as such shall be void unless approved by the company in general meeting. In the case of the managing agent being a firm, a change in the partners shall not invoke this provision so long as there is one of the original partners in the firm. *Bhagwanji Morarji v. The Alembic Chemical Works Co. Ltd.*, 50 Bom. L. R. 499 (P.C.) But a transfer of the office of the managing agent by the managing agent to himself and certain other persons would be void under this provision. *Ramchandra v. Chinubhai*, A. I. R. (1944) Bom 76.

Fourthly, a charge on or assignment of his remuneration or any part thereof shall be wholly void as against the company.

Fifthly, on the company going into liquidation, either compulsorily or voluntarily, the contract of managing agency shall be determined without prejudice to the rights of the managing agent to recover from the company any moneys that may be recoverable from the company. His right to receive compensation for the premature termination of the contract shall, however, be lost if the Court finds that the winding-up was occasioned by his own negligence or default.

Lastly, neither the appointment, removal, nor any variation of a managing agent's contract shall be valid unless approved by a resolution passed at a general meeting of the company notwithstanding s. 86E (*supra*). This requirement, however, shall not apply to the appointment of a first managing agent made prior to the issue of a prospectus or statement in lieu of prospectus where the terms of such appointment are set forth in such prospectus or statement.

## LOANS TO MANAGING AGENTS

S. 87D makes the same provision as to making of loans to managing agents as in the case of directors with the only proviso that the disability therein prescribed shall not apply to any credit held by a managing agent in a current account maintained, subject to limits previously approved by the board of directors, by the company with him for the purposes of the company's business. The section, however, does not apply to a private company unless it is the subsidiary company of a public company.

## CONTRACTS WITH THE COMPANY

Cl. (5) of s 87D further prohibits a managing agent, or the firm of which he is a partner, or any partner of such firm, or if the managing agent is a private company, a member or director thereof from entering into any contract for sale, purchase or supply of goods and materials with the company except with the consent of 3/4ths of the directors present and entitled to vote on the resolution in respect thereof.

## RESTRICTIONS ON POWERS

S. 87G restricts the managing powers of a managing agent in that he shall not, except with the authority of the directors and within the limits fixed by them, exercise a power to issue debentures or to invest the funds of the company. Any delegation of any such power by a company to a managing agent is declared to be void under this section.

## RESTRAINT ON BUSINESS ENGAGEMENTS

Lastly, s 87H restrains a managing agent from engaging, in any way whatever, in any business which is of the same nature as and directly competes with the business carried on by the company under his management or by a subsidiary company of such company.

## REMUNERATION

The Amendment Act, 1936, by s 87C also prescribes the remuneration of a managing agent appointed by a company after the commencement thereof. The section says that it shall be a sum based on a fixed percentage of the net annual profits of the company with provision for a minimum payment in the absence of profits or in case of inadequacy of profits, together with an office allowance to be defined in the agreement of management. It further says that any stipulation for additional remuneration in any form shall not be binding upon the company unless sanctioned by a special resolution of the company.

The expression 'net profits' has also been defined by the section to mean profits calculated after allowing for all the usual working charges, interests on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from Government or a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax or any other tax or duty or for expenditure on capital account or for reserve or any other special fund.

This section, however, shall not apply to insurance companies or to a private company unless it is the subsidiary company of a public company.

## RESTRICTIONS ON COMPANIES UNDER THE SAME MANAGEMENT

(i) The Amendment Act, 1936, also provides for regulating the relations between companies under the same managing agent. S. 87E imposes a restriction upon every company incorporated after the commencement of the Amendment Act against making any loan or guaranteeing any loan made to any other company under manage-

ment by the same managing agent as itself unless such other company be under its own management or subsidiary to itself. The same restriction shall apply to an existing company on the expiry of six months from the commencement of the Amendment Act. Such existing company may, however, renew any existing loan or guarantee of a loan already made to another company under the same management

Any contravention of this restriction by the company shall expose its directors and officers who may be parties thereto to a fine not exceeding Rs. 1,000 and also to a joint and several liability for any loss incurred by the company in respect of such loan or guarantee

(ii) The next restriction is laid down by s. 87F which prevents a company other than an investment company from purchasing shares or debentures of any other company under the management of the same managing agent unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company

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## LECTURE XI

### MEETINGS

*Meetings of the company—Ordinary meeting—Statutory meeting—Extraordinary meeting—Notice of meetings—Quorum—Chairman—Resolutions—Amendments—Points of order—Votes and Poll—Minutes of proceedings—Irregularities*

### MEETINGS

Meetings of shareholders of a company are of three kinds, viz. (1) Ordinary, (2) Statutory, and (3) Extraordinary.

#### (1) ORDINARY MEETING

A general meeting of a company should be held within 18 months from the date of its incorporation and thereafter once at least in every calendar year. This meeting may also be called an Annual General Meeting. The period during which the subsequent meeting should be held is fifteen months from the previous general meeting. The articles may provide that such meetings shall be held on a certain date every year. If no such meeting is held, the company and every director or manager who is a party to the default shall be liable to a fine not exceeding Rs 500 and the Court may, on the application of any member of the company, call or direct the calling of such meeting. (S 76).



Though a distinction must usually be made between an ordinary meeting and an extraordinary meeting, it has been held that the holding of an extraordinary meeting is a sufficient compliance with s. 76. *Hamilton's (Lord Claude) case*, (1873) 8 Ch. App. 548. An extraordinary meeting held on requisition of shareholders, however, is held to be not enough. *Emperor v. Nasurbhai*, 25 Bom. L. R. 224.

(2) STATUTORY MEETING

Every company limited by shares and every company limited by guarantee and having a share capital is required by the amended s. 77 to hold a Statutory meeting of the members of the company within a period of six months and not less than one month from the date on which the company becomes entitled to commence business. The amendment removes the application of this section to a private company (sub-sec. 11).

### Statutory Report

Directors are required to send at least 21 days before the meeting a report called a Statutory report to the members of the company. Such report shall state

(a) the number of shares allotted distinguishing those allotted as fully or partly paid up otherwise than in cash, the amount paid in cash, and the consideration for those allotted as wholly or partly paid up;

(b) an abstract of the receipts and payments made thereout up to a date within 7 days of the date of the report under distinctive headings and an estimate of the preliminary expenses,

(c) names, addresses and descriptions of the directors, auditors, managing agents and managers (if any), and the secretary of the company, and the changes, if any, which have occurred since the date of the incorporation;

(d) if any contract is required to be modified, the particulars of such contract with those of the proposed modification or the actual modification which is to be submitted for the approval of the members at the meeting;

(e) the extent to which underwriting contracts, if any, have been carried out;

(f) the arrears, if any, due on calls from directors, managing agents and managers; and

(g) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager, or a partner of the managing agent if it be a firm, or if it be a private company, a director thereof.

Such report should be certified by at least two directors, or by the chairman of the directors if so authorized by them. A copy of such report certified in this manner should also be filed with the Registrar after the sending thereof to the members of the company.

It must be noted, in regard to clause (d) above, that a company cannot, before the statutory meeting, alter the terms of any contract referred to in the prospectus.

It must further be noticed that the report so far as it relates to (a) and (b) should be certified as correct by the auditors of the company.

### **Procedure at the meeting**

When the statutory meeting is held, the directors must, at the outset, cause a list of members and of the number of shares held by them respectively to be produced and to remain open and accessible to the members of the company during the continuance of the meeting. Furthermore, the members attending the meeting can discuss any matter relating to the formation of the company or arising out of the report without having to give any notice for such discussion, but no resolution of which notice has not been given in accordance with the articles can be passed. The meeting, however, may adjourn from time to time and a resolution may be passed at any such adjourned meeting if due notice thereof has been given in the meantime.

### **Consequences of non-compliance**

In the event of any default in complying with the provisions of this section, every director who is guilty of or knowingly and wilfully authorises or permits the default shall be liable to a fine to the extent of Rs. 500. In case of default in filing the statutory report or in holding the statutory meeting the company may be ordered to be wound up under s. 162. The Court may, however, give directions for the statutory report to be filed or a meeting to be held, as the nature of the default may be, and refuse to order the winding-up of the company.

### **(3) EXTRAORDINARY MEETING**

This is a kind of meeting which by its nature is beyond the scope of an ordinary meeting in the sense that it may be called by the directors themselves, or, notwithstanding anything in the articles, on requisition from not less than 1/10th of the holders of the issued shares of the company on which all calls or other sums then due have been paid, for the purpose of some business which must or ought to be transacted without delay.

The requisition must state the object or subjects for which the meeting is to be called, and must be signed by the requisitionists and deposited at the company's registered office.

If the directors fail to call a meeting within 21 days of the lodging of the requisition at the company's office, the requisitionists or a majority of them in value may call such meeting. But, in either case, the meeting must be convened within three months from the

date of the deposit of the requisition. The requisitionists in such a case shall be entitled to be repaid by the company any reasonable expense incurred by them due to the directors' default, and the company in its turn shall retain the sum so repaid out of the fees or other remuneration due or to become due by the company to such of the directors as were in default.

Further, the articles may enable a certain number of members to convene a meeting themselves where there is no board of directors to do so as well as in cases of deadlock among the members of the board. *Brick & Stone Co.*, (1878) W. N. 140; *Sorabji v Scinde & Punjab Co.*, 8 Bom L. R. 478. But in the absence of such a provision, two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent in number of the members of the company may call a meeting [new s. 79 (2) (a)]. If in any case it is impracticable to call a meeting in any of the manners hereinbefore stated, the Court may order it to be convened on the application of any director, or a member of the company, or of its own motion [s. 79(3)].

#### NOTICE OF MEETINGS

All these three kinds of meetings are, of course, general meetings as they are the meetings of all the members of the company, and every member is entitled to a notice of every such general meeting.

The Amendment Act, 1936, introduces entirely a new section for s. 79 of the Act. It is based on s. 115 of the English Act with this difference that whereas the latter allows of its provisions being overridden by the provisions made in the articles of the company, the former here makes certain provisions, namely, those governing the notice to be given for special resolution, the manner of service of notices, the number of members entitled to demand a poll and the form of proxy instruments, incapable of variation by the articles of the company. These matters are no longer left to the vagaries of the promoters of companies, and the provisions made in the section in respect of them are to be strictly complied with by each and every company except a private company not being a subsidiary company of a public company notwithstanding anything contained in its articles.

Firstly, at least 14 days' notice should be given to members to call any meeting other than a meeting for the passing of a special resolution, but it may be called even by a shorter notice if all the members entitled to receive notice consent thereto. In the case of a meeting for passing a special resolution, no less than twenty-one days' notice should be given unless all the members entitled to vote at such meeting consent to such resolution being proposed and passed at a meeting of which less than twenty-one days' notice has been given [s. 81 (2)]. The days here referred to mean clear days exclu-

sive of the day of service and also of the day on which the meeting is to be held. **R. v Turner**, (1910) 1 K. B. 346; **Chambers v Smith**, 13 L. J. Ex. 25.

Secondly, the notice must be served on every member only in the manner provided by Table A in regulations 112 to 116 for the time being but the accidental omission to give such notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting. An omission to give notice of the meeting to those members who reside outside the company shall not also invalidate the proceedings at such meeting **Re Warden and Hotchkiss, Ltd.**, (1945) 1 A. E. R. 507.

Before considering the other provisions of the new s 79, it is necessary to notice some peculiar features of a notice contemplated by the section

If special business is to be transacted at a meeting, the notice must specify its nature, otherwise it would be bad in law **Tiessen v. Henderson**, (1899) 1 Ch. 861. Notice was given in this case convening an extraordinary meeting to consider two alternative schemes of reconstruction, but it did not specify that the directors were strongly interested as underwriters in one of the schemes. It was held that the notice was bad. If any meeting is held in pursuance of such notice, the meeting would not be said to be duly convened and the resolutions passed thereat would be invalid **Narayanlal v. Petit Mfg. Co.**, 33 Bom. L. R. 556.

Notices, however, are not construed strictly if they sufficiently show the substantial nature of the business to be done at the meeting. **Young v. South African Syndicate**, (1896) 2 Ch. 268. Notice of a meeting in this case stated that the object was to adopt new regulations instead of Table A, but did not set out the contents of the new regulations. It was held that the notice was good. In **MacConnell v Prill**, (1916) 2 Ch. 57 however, where the notice of a resolution to increase the capital did not specify the amount of the proposed increase, the notice was held to be bad. See also **Parsharam v. Tata Industrial Bank**, 26 Bom. L. R. 987.

It must also be noted that a meeting once properly convened cannot be postponed by the directors.

## QUORUM

Quorum means a certain number of members on whose presence the meeting of a company can commence its deliberations. This number is usually fixed by the articles. Where it is not so done, under sub-sec. (2) of s. 79, in the case of a private company, two members, and in the case of any other company, five members, personally present, shall be a quorum.

## CHAIRMAN

Before a meeting can start its business, it must have a chairman. The articles may provide for the appointment of a chairman to preside at the meetings of the company. Where no such provision is made the members present at a meeting shall appoint any one of them to be a chairman of such meeting [s. 79 (2) (c)]. It is the duty of the chairman not to close the meeting prematurely. If he does so, a new chairman may be appointed and the business of the meeting may be continued. *National Dwellings Co. v. Sykes*, (1894) 3 Ch. 159. Still, the chairman is not merely a dummy. He has a discretion with regard to the general conduct of the meeting and he may not allow every member to talk as much as he likes *Wall v. London Assets Corporation*, (1898) 2 Ch. 469.

## RESOLUTIONS

Resolutions are of three kinds: (1) Ordinary, (2) Special, and (3) Extraordinary.

(1) An ordinary resolution is one passed by a majority of members present at a general meeting.

(2) A special resolution is one passed at one meeting provided notice of such meeting specifying the intention to propose the resolution as a special resolution is given at least twenty-one days before the date of the meeting (*supra*). The resolution must be passed by a three-fourths majority of the members present in person or by proxy (where proxies are allowed). [S. 81 (2)]

Special resolutions are necessary for the following among other purposes:—

- (1) to change the name of the company with consent of the Central Government (s. 11);
- (2) to alter the memorandum with leave of the Court (s. 12);
- (3) to alter the articles of the company (s. 20);
- (4) to reduce the capital (s. 55);
- (5) to convert any portion of the capital, uncalled, into reserve capital (s. 69);
- (6) to appoint inspectors to investigate the company's own affairs [s. 142 (1)]; and
- (7) to wind up a company voluntarily [s. 203 (2)].

(3) An extraordinary resolution is a resolution passed by such a majority as is required for the passing of a special resolution at a meeting of which 14 days' notice has been given. The notice must specify the intention to propose the resolution as an extraordinary resolution [s. 81 (1)]. Such resolution is necessary when a company is sought to be wound up voluntarily on the ground that it cannot continue its business on account of its liabilities and also for a number of other purposes

The section further provides that the declaration by the chairman that a special resolution or an extraordinary resolution has been carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number of votes recorded for or against the resolution. Accordingly, where the chairman does not find by his declaration the figures of votes for and against the resolution, it will not be open to any party to show from any alleged record of actual voting that the resolution was not carried. *In re Sassoon Ltd.*, 30 Bom L R 598 Nor shall such declaration by the chairman be at all affected even if it is later found that the resolution was passed by votes of unqualified shareholders. *In re Clark & Co.*, (1932) S. C. 269. But it would be otherwise, if the chairman's declaration itself (containing his statement of the numbers of votes for and against a resolution) erroneously shows that the resolution has been duly passed. *Re Caratal (News) Mines Ltd.*, (1902) 2 Ch 498; *Dhakeshwari Cotton Mills Ltd. v Neel Kamal*, (1938) 1 Cal. 90

A printed or typewritten copy of every special resolution and of every extraordinary resolution duly certified by a principal officer of the company must be filed with the Registrar within 15 days from the passing thereof, and a copy of the former must be embodied in or annexed to every copy of the articles issued after the date thereof. Where the articles have not been registered, a printed copy of the special resolution must be sent to any member, at his request, on payment of one rupee or such less sum as the company may direct. (S 82).

### AMENDMENTS

Where a resolution has been moved, an amendment may be proposed but such amendment must not go beyond the scope of the resolution moved, or at least beyond the business covered by the notice convening the meeting. Otherwise, the amendment becomes a counter-proposal which may be rightly disallowed by the chairman. *T. H. Vakil v Radio Club*, 47 Bom. L.R. 428.

### POINTS OF ORDER

A point of order can be raised by any member when anything is done or proposed to be done at a meeting which is contrary to the general rules regulating the conduct of the meetings. The particulars on which a point of order is raised must be given. Thus, where a point of order impeached all votes given at a meeting indiscriminately without specifying reasons, it was held that it was rightly disallowed.

### VOTES AND POLL

Every shareholder is entitled to one vote in respect of each share or each hundred rupees of stock held by him. Where a company has not a share capital, each member is entitled only to one vote. Such

vote may be exercised either on a show of hands or on a poll. The articles, however, may modify this rule, and provide that the voting power shall not depend on the number of shares held. [S. 79(2)(d)].

The person whose name appears on the register as the holder of a share is the only person entitled to vote in respect of it. But the Court may order him to vote according to the direction of another person who has got a better title to his shares, e.g. a mortgagor of shares. *Puddephatt v. Leith*, (1916) 1 Ch 200.

Voting is generally done in this manner. The chairman first takes a show of hands, and each member therein counts as one vote, although he may hold proxies for others. Before, however, the chairman declares the result, a poll may be demanded. Cl (c) of the new s. 79 (1) provides that five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand it, but in the case of a private company, only one member shall be so entitled unless the number of members present be more than seven in which case two members can demand a poll. It must be noted that the articles cannot override these provisions. The chairman may then fix the time and place for taking the poll but, if the articles give him a discretion, he may take it just that moment. When the poll is taken, each person voting signs a paper 'for' or 'against' the resolution and proxies are counted unless disallowed by the articles [S 79 (2) (e)]. It may be noted here that the main difference between a poll and a voting on a show of hands is that in the former proxies though held by one of the members voting may be counted, while in the latter the member holding the proxies counts only as one vote.

## PROXY

An instrument of proxy is a writing (stamped 2 as ) authorising a member of a company to vote for another shareholder at a certain meeting or meetings of the company. The power to vote by proxy on poll is now conferred by the new s 79 (2) (e) unless expressly taken away by the articles. Articles generally provide that proxy papers must be deposited at the company's office before the meeting. The instrument appointing a proxy may be in the form set out in the articles but if, in spite of that, it is in the form set out in regulation 67 of Table A, it shall not be questioned on the ground that it does not comply with the articles in that behalf [s. 79 (1) (d)]. At any rate, it must be in writing in favour of a member of the company under the hand of the appointer or his attorney duly authorised in writing unless the articles have made some other provision in that behalf. [s. 79 (2) (f) & (g)].

## MINUTES OF PROCEEDINGS

S. 83 requires every company to cause minutes of all proceedings of general meetings and of its directors to be entered in a book called the Minute Book. The minutes so entered must be signed by the chairman of the meeting at which the proceedings took place or of the next succeeding meeting, and, thereupon they will be the *prima facie* evidence of the proceedings. The minutes may be transcribed from rough notes taken at the meeting but, in any event, they must be drawn up within a reasonable time if no time is prescribed by the articles for the purpose. **Toms v. Cinema Trust, Ltd.**, (1915) W. N. 29. Further, the minute book should really be a bound book. Entries made in a number of loose sheets tied together in two covers are not admissible in evidence as minutes entered in a book. **Hearts of Oak Assurance Co., Ltd. v. Flower**, (1936) Ch. 76.

Though the minutes are *prima facie* evidence of what happened at the meeting, they are neither conclusive nor exclusive evidence of the actual proceedings. The Court, for instance, may look at the notice of the meeting to ascertain that the proceedings were regular. **Betts & Co. v. Macnaghten**, (1910) 1 Ch. 430. It may also admit other evidence to prove a particular proceeding in the absence of a minute in that behalf. **Knight's case**, (1867) 2 Ch. App. 321; **Re Great Northern Salt Co.**, 44 Ch. D. 472; **Re Pyle Works (No. 2)**, (1891) 1 Ch. 173; **Umney v. Fireproof Doors, Ltd.**, (1916) 2 Ch. 142. Where, however, an extraordinary general meeting of a company was summoned in order to offer for sale to the members shares over which the company had a lien, and the plaintiff claimed that he was the highest bidder for a block of shares and that, therefore, a contract was created for the sale of such shares whereas the minutes of the meeting showed that no such contract was entered into, it was held that the plaintiff was not entitled to lead evidence in proof of his claim as the minutes were conclusive evidence of the facts stated therein. **Kerr v. John Moitram Ltd.**, (1940) Ch. 657.

The Amendment Act, 1936, has introduced four new sub-sections to s. 83. Sub-section (4) requires the minute books of a company in respect of all proceedings at general meetings held after 15th January, 1937, to be kept at its office and allowed to be open for not less than two hours on each working day to the inspection of any member free of charge. The next sub-section entitles the members to call upon the company at any time after seven days from the meeting to furnish him with a copy of any of such minutes within seven days at a charge not exceeding six annas for every hundred words. Provisions of these two sub-sections, it must be noted, do not apply to proceedings at directors' meetings. In default of compliance with these provisions, sub-section (6) penalises the company and every officer, who is knowingly and wilfully a party thereto, to a fine not exceeding Rs. 25 and to a further fine of Rs. 25 for every day of the default. In



addition, the Court may compel the compliance with the provisions under sub-section (7).

### INFORMALITIES AND IRREGULARITIES

If all the members of the company are present and vote for the resolution, it will be valid in spite of informalities and irregularities. Even where a minority of shareholders are alleged to have been overborne by the vote of a majority, the former cannot complain of acts which are valid if done with the approval of the majority or are capable of being confirmed by the majority. Mere irregularities or informalities which can be remedied by the majority are not sufficient and the Court will not interfere at the instance of a minority to correct such irregularities where the acts themselves are not *ultra vires* the company. *Foss v. Harbottle*, 2 Hare, 461; *Bhajekar v. Shinker*, 36 Bom. L. R. 483.

But where the company acts on resolutions which are inconsistent with the articles, or which are passed on inadequate notice, the Court will interfere by injunction. The Court will also interfere at the instance of a minority or an individual shareholder where the act complained of is *ultra vires* the company or of a fraudulent character. *Burland v. Earle*, (1902) A. C. 83; *Menier v. Hoopers' Telegraph Works*, (1874) 9 Ch. App. 350; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56; *Vadilal v. Manecklal*, 27 Bom. L. R. 48; *Dhakeshwari Cotton Mills Ltd. v. Neel Kamal*, (1938) 1 Cal. 90; *Bhajekar's case* (*supra*). Rangnekar, J. in the last-mentioned case enunciates the law on this point in very clear terms:

"Where an action is brought by shareholders they should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity.... The supremacy of the majority of shareholders is subject to certain exceptions. (a) where the act complained of is *ultra vires* the company; (b) where the act complained of is a fraud on the minority; (c) where there is absolute necessity to waive the rule in order that there may not be a denial of justice."

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## LECTURE XII

### ACCOUNTS, AUDIT, CONTRACTS AND COMPROMISE

*Accounts and Audit—Investigation by Registrar and Inspection—Auditors—Contracts by companies—Interest of directors in companies' contracts—Arbitration—Compromise or Scheme of Arrangement—Scheme of Reconstruction or Amalgamation.*

## ACCOUNTS AND AUDIT

The Indian Companies Act of 1913 made a step in advance of the English Companies Act of 1908 in that the former by section 130 made it obligatory upon every company to keep proper books of account in which shall be entered full, true and complete accounts of the affairs and transactions of the company. The new English Act of 1929, however, now provides for this by s. 122.

This s. 130 is now substituted entirely by a new section under the Amendment Act, 1936, which gives the details of the books and the manner of keeping accounts. It says in the first clause that every company shall cause to be kept proper books of accounts with respect to (i) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, (ii) all sales and purchases of goods, and (iii) the assets and liabilities of the company.

The second clause of the section requires the books to be kept at the company's office or at such other place as the directors think fit, and they shall be open to inspection by the directors during business hours. This clause entitles the director of a company to take inspection of its accounts not only personally but also through an agent provided there is no reasonable objection to the person chosen as an agent and the agent undertakes not to utilize the information obtained by him for any purpose other than the purpose of his principal. Any provision in the articles of association to the contrary is null and void. *Vakharia v. Supreme General Film Exchange Co.*, 50 Bom. L. R. 140.

The Amendment Act II of 1938 adds one more sub-section to this section which provides that where a company has a branch office, the above two requirements shall be deemed to have been complied with if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarised returns are sent to the head office at the intervals of not more than two months.

In the event of any director or managing agent failing to secure compliance with these requirements or being by his own wilful act or omission the cause of any default by the company in that behalf, sub-section (4) makes him liable to a fine to the extent of one thousand rupees.

Under the next section which has also been altered in some respects by the Amendment Act, 1936, the directors of every company are required at some date not later than 18 months after the incorporation and subsequently once at least in every year, to prepare and lay before the company in general meeting a balance sheet and a profit and loss account audited by the auditors of the company with the auditor's report attached thereto or referred to at the foot thereof. The directors are also now under s. 131A required to make

out and attach to every balance sheet a report with respect to the state of the affairs of the company, the amount, if any, which they recommend as dividend, and the amount, if any, which they propose to carry to the reserve fund, general reserve or reserve account shown specifically on the balance sheet or to be shown in a subsequent one. This report should be signed by the chairman of the directors on their behalf if so authorised by them, otherwise it should be signed by all of them. In default of compliance with these requirements, each of them shall be liable to the like penalty as under the preceding section.

In the case of the first account, the balance sheet and the profit and loss account should be made up since the incorporation and in any other case since the preceding account to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside India by more than twelve months. The Registrar may, however, for any special reason extend the period for laying them before the general meeting in a particular case by three months at the most.

But before laying them before the meeting, the company must send a copy thereof to every member at least fourteen days before the meeting, and a copy must also be deposited at the registered office of the company for inspection of members at the same time [s. 131 (3)]. Holders of preference shares and debentures of a company registered under the Act, other than a private company, have the same rights to receive and inspect the balance sheet and the profit and loss account as the members of the company. Trustees for debenture-holders of a public company registered before or after the commencement of the Act also have similar rights. (S. 146).

### Balance sheet

A balance sheet is a pictorial representation of the trading position of a company, easily appreciated not by ignorant people, but by persons who are reasonably able to understand commercial expressions and commercial conditions. **Legal Remembrancer v. Akhil Bandhu**, (1937) 1 Cal. 328. It must contain a statement of the property and assets and of the capital and liabilities and how the value of the fixed assets has been arrived at. The balance sheet should be in the form 'F' in the third Schedule or as near thereto as circumstances admit. [S. 132 (1) and (2)].

Where a company holds shares, directly or through a nominee, in a subsidiary company, s. 132A requires that there should be annexed to its balance sheet a statement duly signed as the balance sheet itself under s. 133 (*infra*) stating how the profits and losses of the subsidiary company have been dealt with for the purposes of the accounts of the holding company, and in particular, how and to what extent provision has been made for the losses of the subsidiary com-

pany either in the accounts of that company or of the holding company or both, and how far they have been taken into account by the directors of the holding company in arriving at the profits and losses as disclosed in its accounts. No amount of profits and losses, or any part thereof which has been dealt with in a particular manner need, however, be specified in such statement. If the auditor's report on the balance sheet of the subsidiary company is in any way qualified, the statement must contain the particulars of the manner in which it is qualified. If however, for any reason the directors of the holding company are unable to obtain the information necessary for preparing the aforesaid statement, they must so report in writing and their report shall be annexed to the balance sheet in lieu of the statement.

### Profit and loss account

The profit and loss account must set out particulars showing the total of the amount paid whether as fees percentages or otherwise to the managing agent if any and the directors respectively as remuneration for their services and where a special resolution of the company so requires to the manager and the total of the amount written off for depreciation. Besides if any director of the company is by virtue of the nomination whether direct or indirect, a director of any other company any remuneration or other emoluments received by him for his own use in any capacity in connection with the management of the latter must also be shown in a note at the foot of the account or in a statement attached thereto [S 132 (3)].

### Requisite formalities

Every balance sheet and profit and loss account must be signed, in the case of a banking company by the manager or managing agent (if any) and by all the directors when they are only three and at least three when they are more and in the case of any other company by at least two or by the sole director where there is only one as well as the manager or managing agent (if any). An exception is however made where some of the directors are outside British India. In such a case only those in British India must sign the balance sheet and if there is only one such director, he alone must sign it. In either event a statement explaining the reason for the non-compliance with the provisions of the section as to requisite signature must be subjoined to the balance sheet by such directors or director as the case may be [S 133 (1) & (2)].

If any balance sheet is issued, circulated or published which does not comply with the requirements under ss 131, 132, 132A and 133 explained above, the company and every officer who is knowingly a party to the default shall be punishable with fine extending to Rs 500 [S 133(3)].

Again, a company other than a private company is required to file three copies of its balance sheet signed by its manager or secretary with the Registrar together with the copy of the annual list of members and summary prepared under section 32. In the event of the general meeting not adopting the balance sheet, a statement of that fact and reasons therefore should also be annexed to the balance sheet and to copies thereof to be filed with the Registrar (S. 134).

#### **Additional requirement for banking and other companies**

Section 136 of the Act, however, makes special provision for limited banking and insurance companies and deposit, provident and benefit societies, and in addition to preparing and filing a copy of the balance sheet, they are required to make a statement of the assets and liabilities in the form marked "G" in the third Schedule to the Act, first before such company or society commences business, and then on the first Monday in the months of February and August respectively in every year. Further, such statement together with the last audited balance sheet should be displayed and kept displayed in the registered office and every branch office of the company or society until the display of the next following statement. Every member and creditor in such a case will be entitled to a copy of such statement on payment of a sum not exceeding eight annas. These provisions, however, do not apply to a life assurance company or a provident insurance society to which the Indian Life Assurance Companies Act, 1912, or the Provident Insurance Societies Act, 1912 applies, provided such company or society complies with the provisions of these Acts.

#### **INVESTIGATION BY REGISTRAR AND INSPECTION**

Power of investigation of matters contained in documents which are required to be filed with the Registrar under several provisions of the Act is given to the Registrar by s. 137 of the Act. This is a general provision conferring on the Registrar a general power to call by a written order for any information and explanation which, in his opinion, may be necessary in order that the document in question may afford full particulars of the matters to which it purports to relate. The same power can now be exercised by him where he is of opinion on the materials placed before him by any contributory or creditor that the business of the company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose. In such a case he may by a written order call on the company for information or explanation on matters specified in the order within such time as he may specify therein. In case of winding up, the Registrar can exercise this power as against the liquidator and call upon him to produce such documents as he may require. (New cls. 6 and 7). The section also

makes it a duty on the part of all the officers of the company to furnish such information or explanation to the best of their power which, on being furnished, forms part of the original document. In default, they are liable to a fine to the extent of Rs 50 for each offence, and the Court may, on the application of the Registrar, make an order on the company for production of such documents as, in its opinion, may be reasonably required by the Registrar for his investigation and allow him inspection of the same. If, however, in spite of the explanation or information being furnished, the Registrar is of the opinion that the document does not disclose a satisfactory or full and fair state of affairs to which it relates he is required to report the matter in writing to the Central Government which may take action thereon under s 138 by appointing one or more competent inspectors to investigate the affairs of the company. The Government may take such action also on the application of members of the company both in respect of the company itself and a subsidiary company of such company, if any [s 132A (6)] Such members ought to hold 1/5th of the shares issued in case of a banking company, 1/10th of the shares issued in case of any other company, and in the case of a company not having a share capital, such members ought to be at least 1/5th in number of the persons on the company's register of members (s 138). The application of members must be supported by such evidence as the Central Government may require in order to show their *bona fides* as also the reason for such application. And the applicants may be required to give security for payment of the costs of the inquiry (S 139).

The inspectors appointed by the Government in any of the above circumstances have a power to examine all books and documents of the company and also any officers thereof on oath (s 140). On conclusion of the inquiry, the inspectors report their opinion to the Government and a copy of such report is forwarded to the company and another to the Registrar. The Government may order the costs of the inquiry to be paid either by the applicant members or the company where it has acted on the application of members, and out of the assets of the company where it has acted on the report by the Registrar (S 141).

Where, from any report made to the Central Government under the foregoing provisions, it appears that any person has been guilty of a criminal offence in relation to the company, the Central Government, under the new s 141A is required to refer the matter to the Advocate-General or the Public Prosecutor. If the latter be of the opinion that it is a fit case for prosecution, he shall cause proceedings to be instituted and it shall be the duty of all officers and agents of the company, past and present, to give him all reasonable assistance in connection therewith. If the proceedings result in a conviction, the convict shall be debarred, except with the leave of the

Court, from being in any way, directly or indirectly, concerned in or taking part in the management of a company for a period of 5 years from the date of such conviction.

Section 142 of the Act empowers every company to appoint inspectors to investigate its affairs by means of a special resolution. These inspectors also have the same powers and duties as those appointed by the Government, except that they have merely to report in such manner and to such persons as the company in general meeting may direct.

Section 143 authorises a copy of the report of any inspectors appointed under the above provisions and bearing the seal of the company whose affairs have been investigated to be admissible in a Court of law as evidence of the opinion of the inspectors on any matters contained in the report.

## AUDITORS

The articles of association usually provide for the appointment of auditors and a periodical audit of accounts. But the matter being of very great importance both to the shareholders and the public, the legislature itself has made certain statutory provisions in that regard in ss. 144 and 145 of the Act, also recently amended. The former of these sections deals with the qualifications and appointment of auditors and also makes such appointment obligatory on every company while the latter lays down powers, duties and liabilities of auditors

### Qualification and Appointment

It must be noted here that s. 144 was amended by Act XVIII of 1930, and entirely new provisions regarding the qualifications of an auditor were introduced. A person can be appointed and act as an auditor of a company if he holds a certificate from the Governor-General-in-Council entitling him to act as such. A firm can also be appointed and act as auditors if all the partners thereof hold such certificates. Such certificates are given under the rules made by the Governor-General-in-Council which also provide for cancellation of such certificates under certain circumstances.

Together with these provisions, clause (5) of s. 144 says that (1) a director or officer of the company, or (2) a partner of such director or officer, or (3) any person in the employment of such director or officer, or (4) a person indebted to the company, although possessing the qualifications of an auditor as stated in the section, shall not be appointed an auditor.

But in the case of a private company a qualified auditor is not necessary (cl. 1), and a person in the employment of a director or officer of such company may be appointed an auditor, though such director, officer or his partner cannot be so appointed (cl. 5).

In any case, if a person, after being duly appointed an auditor, becomes indebted to the company, his appointment shall be terminated

An appointment of an auditor can be made only in the manner prescribed by the Act (cl 6). The procedure is that a member of a company has to give notice to the company of his intention to nominate a certain person other than a retiring auditor as an auditor at least 14 days before the annual general meeting. The company sends a copy of such notice to the retiring auditor and gives notice thereof to its members either by advertisement or in any other manner allowed by the articles at least 7 days before the annual meeting. If, however, the annual meeting is called for a date 14 days or less after the notice to nominate has been given the requirements of the section as to time shall be deemed to have been satisfied. And the company may give or send the notice at the same time as the notice of the annual general meeting.

The first auditors of a company may be appointed by the directors before the statutory meeting and hold office until the first general meeting. The company may remove them by a resolution in a general meeting and appoint other auditors. Subsequent appointment should be made at every annual meeting. If no such appointment be made the Central Government may on the application of a member make such appointment and fix the remuneration of the auditor so appointed. A casual vacancy in the office of an auditor may be filled by the directors but the surviving auditors (if any) may act during the period of such vacancy.

The remuneration of the first auditors appointed by the directors before the statutory meeting may be fixed by the directors, and that of the auditors appointed annually should be fixed by the company in general meeting.

#### **Powers, Duties and Liabilities**

Every auditor of a company is empowered to have a free and complete access at all times to the books, accounts and vouchers of the company and also to require from the directors and officers of the company such information and explanation as may be necessary for the performance of his duties as an auditor [s 145 (1)]. The Act nowhere lays down the duties of an auditor beyond the one to make a report on the accounts examined by him, but they have been described by the Courts in several cases.

It is obligatory on the auditors of a company to make themselves acquainted with their duties under the articles and under the Companies Act for the time being in force. *In re Republic of Bolivia Syndicate*, (1914) 1 Ch. 139. The general duties of auditors have been fully discussed in two leading cases, *In re Kingston Cotton Mill Co.*, (1896) 2 Ch. 279 and *In re London and General Bank*, (1895) 2



Ch. 673. Again, they were reviewed by the Court of Appeal in a later case *In re City Equitable Fire Insurance Co.*, (1925) 1 Ch. 407, and the following propositions were laid down.—(a) The measure of an auditor's responsibility depends upon the terms of his engagement, either by a special contract or as contained in the articles; (b) The duty imposed on the auditors by the Act is not defined as regards its nature or extent, but it depends on the information and explanation furnished to them. There is abundant scope for their discretion. The auditors, however, will not be excused for their total omission to comply with any of the requirements of the Act, or for the consequences of deliberate or reckless failure to ask for information on matters which call for further explanation, (c) Auditors should not be content with a certificate that the securities of the company are with a particular person or firm unless such person or firm, is trustworthy, and further, is one which in the ordinary course of business keeps securities for his or its customers. In all these cases, the auditors must exercise their discretion. Generally, the duties of an auditor may be said to be these (1) he must make himself acquainted with his duties under the articles and under the Act; (2) he must see that the books show the true financial position of the company; (3) he must report all material points to the shareholders; (4) he must be honest, and exercise reasonable care, otherwise he is liable in damages; (5) he is not bound to give advice nor is he concerned with how the business is being carried on, (6) he is further justified in trusting the servants of the company provided he uses reasonable care, (7) on the other hand, if anything suspicious occurs, he is bound to go deep into it. Auditors will not be made liable for not tracing out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion and when these frauds are perpetrated by tried servants of the company and have not been detected by the directors for years.

The auditors are required to make a report on the accounts examined and the balance sheet and profit and loss account prepared by them. Such report should state (1) whether or not they have obtained all the necessary information and explanations; (2) whether the balance sheet is drawn up in conformity with the law, (3) whether the balance sheet exhibits a true and correct view of the state of the company's affairs according to the best of the information and explanations given to them, and as shown by the books of the company; and (4) whether the books of account have been kept as required by s 130 [s 145 (3)].

In the case of a banking company having branches beyond the limits of India it will be enough if the auditors are allowed access to such copies and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India [s 145 (3)]

Auditors are now entitled under cl. (4) newly added to s. 145 to attend any general meeting of a company at which any accounts examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

An auditor who commits a breach of his duty can be sued by the company for damages and, in a winding-up, he may be liable for misfeasance under section 235 of the Act. Further, if he makes a report which does not comply with the aforesaid requirements, and the default in that behalf is knowingly committed, he shall now be liable to a fine not exceeding Rs. 100 under the new clause (5) added to s. 145 by the Amendment Act, 1936.

## CONTRACTS BY COMPANIES

The only subjects in regard to the management and administration of a company which now remain to be dealt with are the contracts entered into by a company after it commences business, and secondly, the power of a company to settle disputes with its creditors or members by or without an arbitration.

Sections 88 to 91D provide for the manner in which contracts by or on behalf of companies may be made, and also state the effect of such contracts. According to s. 88, a contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing, signed by any person acting under its authority, express or implied. Similarly, a contract which would be valid even if it be made orally as between private persons may be so made on behalf of the company by any person with an express or implied authority from it. Such contracts will be binding on the company and its successors and all other parties. In other words, contracts by companies under this section are not required to be under seal.

Next section lays down an important rule of law excluding personal liability of those who make, accept or endorse negotiable instruments on behalf of a company. Accordingly, a bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by, or on behalf or on account of, the company by any person acting under its authority, express or implied. The question whether the personal liability is excluded or not on such a negotiable instrument is one of construction thereof, more so because the section does not say that the document must be expressed to be made, drawn, etc. Where, therefore, the endorsement was M. & Sons, Managing Agents of L. A. & Co., it was held that it would not necessarily be clear that the responsibility of L.A. & Co., was involved, and that, therefore, L. A. & Co. were not liable

on the bill. *Shreelal v. Lister Antiseptic Dressing Co.*, 52 Cal. 302. Similarly, where a hundi was accepted by A for and on behalf of B. & Co., it was held that A was not liable. *Ibrahim Fazulbhai v. International Banking Corporation*, 27 Bom. L. R. 283.

Section 90 provides the manner in which deeds may be executed on behalf of the company in or outside British India. The company in such a case empowers a person by writing under its common seal to execute deeds on its behalf either generally or in regard to some specified matters, and the effect of the deeds signed by the person so authorized and under his seal where sealing is required would be to bind the company as if they were under its common seal.

Section 91 empowers the company to have an official seal for use abroad on documents which require it, and for that purpose, it has to authorize a person to affix the seal to any document or deed to which the company is a party. As between the company and an outsider, such authority continues during the period mentioned in the instrument conferring the authority, and where no period is mentioned, until notice of revocation or determination thereof has been given to such outsider. The effect of a document with an official seal affixed thereto is to bind the company as if it has been sealed with the common seal of the company.

Where an agent or a manager of a company other than a private one enters into a contract on behalf of the company with the company as an undisclosed principal, he shall, at the time of making the contract, make a memorandum thereof and deliver the same to the company forthwith to be placed before the next meeting of the directors and also deliver copies thereof to the directors of the company. If he fails to do any of these things, the company may avoid the contract, and he may be liable to a fine to the extent of Rs 200 in addition (S 91D)

## INTEREST OF DIRECTORS IN COMPANY'S CONTRACTS

Section 91A lays a duty on directors as regards the disclosure of their interest in the contracts or arrangements entered into by or on behalf of a company. This and other provisions contained in the next two sections have been necessitated by two principles of law, viz., that a director cannot enter into a contract with the company of which he is a director, and secondly, a director should not have any direct or indirect interest in any contract entered into by or on behalf of the company of which he is a director. But the true effect of these provisions is to allow a director both these liberties on certain conditions.

Firstly, he must disclose the nature of his interest at the meeting of the directors at which such contract is determined on. If he acquires an interest subsequently, he must disclose it at the first meeting thereafter. The wording of the section also covers the cases

of contracts or arrangements which do not come up in the ordinary course before the directors for confirmation, for instance, contracts which a managing director is authorized by a general resolution of the directors to enter into on behalf of the company, or contracts which for some other reason have not got to be brought up before the board of directors for sanction. Where, however, the general body of directors are aware of such interest, it is not necessary to make any disclosure. *Imperial Mercantile Credit Association v Coleman*, L R 6 Ch App at p 568; *P. Venkata Chalaputty v Guntur Cotton, etc. Mills*, A I R, (1929) Mad. 353. If a director is connected with any firm or is a member or director of a specified company and a general notice is given that he is to be regarded as interested in every transaction with such firm or company, it shall be a sufficient disclosure and no special notice need be given with regard to any particular transactions thereafter. (S 91A)

Secondly such director cannot vote on any such contract. *K. C. Pandalai v South Indian General Assurance Co. Ltd.*, A I R (1942) Mad 95. But directors can vote on a contract of indemnity against any loss which they may suffer by reason of becoming or being sureties for the company. At any rate the section does not operate to deprive of the benefit of his contract with the company a third party who has no notice of the defect in the directors' authority for such a person is entitled to assume that the internal management of the company has been properly conducted. *T. R. Pratt (Bombay), Ltd. v M. T. Ltd.*, 40 Bom L R 1109 (P C). The prohibition contemplated in this section does not apply to a private company unless it is a subsidiary company of a public company. (S 91B)

Section 91C provides that where a company enters into a contract for the appointment of a manager or a managing agent in which any director is directly or indirectly interested, or varies such contract, the company shall within 21 days send an abstract of the terms of such contract or variation to each of its members together with a memorandum clearly indicating the nature of the interest of such director in such contract or variation. The contract shall also be kept at the registered office of the company for the inspection of members.

In all these cases, the directors and all persons guilty of any default are liable to be fined in various sums.

### Register of contracts

It may be noted here that the newly added cl (3) to s. 91A requires a company to maintain a register in which should be entered particulars of all contracts and arrangements referred to in the earlier part of the section and such register shall be open to inspection by any member at the registered office of the company during business hours.

## ARBITRATION

Section 152 of the Act empowers a company to refer to arbitration any existing or future dispute as between itself and any other company or person. The reference has to be made in writing in accordance with the Arbitration Act, 1940. The companies, parties to the arbitration, may also delegate to any arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

## COMPROMISE OR SCHEME OF ARRANGEMENT

Section 153 empowers a company to compromise and settle disputes with its creditors and members without going to any arbitration for the purpose. The procedure laid down is this. Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company, creditor or member thereof, or of the liquidator in the case of the company being wound up, order a meeting of the creditors or members concerned to be called, held and conducted in such manner as the Court directs. If, at such meeting, the proposed compromise or arrangement is agreed to by a majority of  $\frac{3}{4}$ ths in value of such creditors or members who may be present at the meeting either in person or by proxy, the Court may sanction the same, whereupon it shall be binding on all the creditors or members and the company, or in the case of the company being wound up, on the liquidator and the contributories of the company. The Court may, in the meantime, stay any suit or proceeding against the company until the disposal of such application. The order of the Court, however, shall not take effect until a certified copy thereof has been filed with the Registrar. A copy of every such order should further be annexed to every copy of the memorandum of the company issued thereafter in default whereof the company and every officer knowingly and wilfully a party thereto shall be liable to a fine to the extent of Rs 10 for every copy. The order under this section is appealable.

### Scope of s. 153

It will be admitted that companies like individuals may also find it necessary sometimes to compromise or make an arrangement with their creditors. The company law, therefore, has laid down the method in which such compromises could be effected or arrangements arrived at. A scheme of arrangement under this section is in effect an alternative method of winding-up which, by operation of law, is effective to relieve the company and its contributories from further liability than that which is imposed by the scheme. *In re London Chartered Bank of Australia*, (1893) 3 Ch. 540.

S. 153 is applicable where there is and where there is not a winding-up in progress, that is to say, it would apply to a going concern as well as to a concern which is being wound up. S. 213 which is now replaced by sections 208C and 209F by the Amendment Act, 1936, on the other hand, is applicable only in view of a winding-up or in the course of a winding-up. Further, all modes of reorganizing the share capital even when involving an interference with preference or special rights attached to shares by the memorandum, can be effected as part of an arrangement with members under this section. *Katni Cement, etc., Co. Ltd., In re*, 39 Bom. L. R. 675. It may be recalled at this stage that s. 54 which dealt with reorganization of share capital has been recently deleted and sub-section (6) of this section has been redrafted by s. 3 of the Indian Companies (Amendment) Act, 1942 (XVII of 1942), so as to embody within the term 'arrangement' used in the section a re-organization of share capital of a company by consolidation of shares of different classes or by division of shares into shares of different classes or by both those methods.

### Sanction of the scheme

Whether to sanction a scheme or not, is entirely a matter of discretion with the Court. In exercising its power of sanction, the Court will see first that the provisions of the statute have been complied with, and secondly, that the class was fairly represented by those who attended the meeting, and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent, and thirdly, that the arrangement is such as a man of business would reasonably approve. *Buckley*, 10th Edn., p. 284; *Durham Long & Co., In re*, (1934) Ch. 635; *Dawson v. Hormusji*, 10 Rang. 438; *In re Indian Flour Mills, Ltd., A. I. R.*, (1934) Sind 54. As an illustration of the first of these conditions, reference may be made to *In re St. James' Court Estates, Ltd.*, (1944) 1 Ch. 6 in which the Court refused to sanction a scheme of arrangement whereby the company proposed to convert issued preference shares into redeemable preference shares on the ground that such conversion was not an issue of shares within s. 46 of the English Act, 1929, (corresponding to s. 105B of our Act) and was not authorised by sub-section (1) of that section. The test of a reasonable compromise or scheme is whether it is regarded by reasonable people conversant with the subject as beneficial to those who are making it. *Katni Cement, etc., Co. Ltd., In re*, (*supra*). If the Court is satisfied that the scheme is reasonable and fair it need not necessarily make any provision in favour of the dissentients. *Ibid.* If the Court thinks that a scheme ought not to be sanctioned without a radical amendment or altera-

tion, it is not open to the Court *suo motu* to impose any sort of modification or condition in sanctioning the same except with the consent of those who have agreed to it. *Mihirendra v. Brahmanberia Loan Co. Ltd.*, 61 Cal. 913; *Mymensingh Loan Office, Ltd., In re*, 41 C. W. N 599; *In re Natore Kamala Bank, Ltd.*, (1937) 1 Cal. 368. Where, however, a reasonable doubt exists as to the rights of shareholders under the memorandum of a company, the existence of such doubt in itself is a ground for sanctioning a scheme the effect of which is to remove that doubt. *Edinburgh Rly. Access Co. v. Scottish Metropolitan Assurance Co.*, (1932) S. C. 2.

A scheme otherwise reasonable and fair is not invalidated on the ground that notice of the meeting at which it was arrived at was not duly served upon each and every creditor or shareholder of the company. *Bhagat Ram v. Angel's Insurance Co. Ltd.*, A I R, (1937) Lah. 442, *Mahigunj Loan Office v. Behari Lal*, (1937) 1 Cal 781; *Re Anglo-Spanish Tartar Refineries, Ltd.*, 68 S J 738. In the Lahore case, there was an inadvertent omission to advertise the scheme but it was proved that 30 out of 31 shareholders of the company had received the notice of the meeting at which the scheme was arrived at. The Court held that the meeting had in substance been held in the prescribed manner, and that it would not insist on further meetings being convened. In the course of the judgment it was observed that s 153 does not make it obligatory upon the company or the Court to serve a notice of meeting on each and every creditor or shareholder of the company, and that there is no law or decision which would invalidate a decision arrived at by the creditors or shareholders and the company in the absence of any individual creditor or shareholder.

#### Variation of the scheme

A scheme of arrangement drawn up in respect of a company and sanctioned by the Court under the foregoing provisions can be varied only by an order of the Court after the terms of the proposed variation have been approved at meetings of creditors and shareholders of the company. *Premila Devi v. Peoples' Bank of Northern India, Ltd.*, 41 Bom. L. R. 147 (P. C.).

#### SCHEME OF RECONSTRUCTION OR AMALGAMATION

The Amendment Act, 1936, adds two more sections, 153A and 153B, in order to facilitate arrangements and compromises for the purposes of reconstruction or amalgamation of companies.

##### (i) By transfer of undertaking

If, on the application made under s. 153, it is shown to the Court that the compromise or arrangement has been proposed for the purposes of a scheme of reconstruction of the company or amalgamation of any two or more companies, and if under the scheme, the whole

or any part of the undertaking of one company is to be transferred to another company, the Court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, provide for all or any of the following matters:—

(i) The transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of the transferor company. Such provision in the order shall itself operate to transfer the property and vest the same in the transferee company as also the liabilities which shall thenceforth be the liabilities of the transferee company. The property so transferred, however, does not include the interest of the transferor company in the contracts of personal service existing between them and their employees so as to render the employees of the transferor company the employees of the transferee company from the date of the making of the order. *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, 56 T. L. R. 988—(1940) 3 A. E. R. 549.

(ii) The allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person.

(iii) The continuation by or against the transferee company of any legal proceedings pending by or against the transferor company.

(iv) The dissolution, without winding up, of the transferor company.

(v) Such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Where such order is made, it is the duty of each of the companies concerned to cause a certified copy thereof to be delivered to the Registrar for registration within 14 days after the completion of the order. In default the company and every officer knowingly and wilfully a party thereto shall be liable to a fine to the extent of Rs. 50.

It may be noted that though the provisions of s. 153 apply to every company, registered or unregistered, which is liable to be wound up under the Act, the foregoing provisions of s. 153A do not apply except to companies within the meaning of the Act.

### (ii) By sale of shares

The next s. 153B facilitates the carrying out of a scheme or contract of reconstruction and amalgamation by sale of shares. Where such a scheme is proposed by the transferee company, it must be approved by the holders of not less than 3/4ths in value of the shares affected within 4 months of the proposal. If the proposed scheme is approved, the transferee company may at any time within 2 months after the expiration of those 4 months give notice in the prescribed manner to the dissenting holders, if any, stating its desire



to acquire their shares. The dissenting holders or any of them may within a month from the date of the notice apply to the Court challenging the scheme. If, however, the Court refuses to make an order affecting the scheme, the transferee company shall be entitled and bound to acquire those shares on the same terms as those approved by the other shareholders. What the Court has to consider before arriving at its decision in such cases is whether the dissenting shareholders are to be left in possession of their shares or whether they should be compelled to sell their shares on the same terms as those which the other shareholders have accepted. Though the Legislature does not indicate the grounds on which the Court is to intervene in such cases, the Court while considering the aforesaid questions would be justified in intervening and not accepting the opinion of the majority of the shareholders if it is shown that there has been some misrepresentation which has influenced the view of the majority, or where there has been some unfair dealing, or where there has been gross undervaluation of the assets of the transferor company resulting in the offer being unfair or substantially less than what it should have been. The onus in these cases is on the dissenting shareholders to show ground for intervention amounting to evidence that the scheme is unfair. **Re Evertite Locknuts, Ltd.**, (1945) 1 A E. R. 403. In no case, however, the Court can direct the transferee company to pay to the dissenting shareholders what it has not offered to pay. **The Govt. Telephone Board, Ltd. v. Seervai**, I. L. R. (1943) Bom. 581.

If any such scheme or contract has been approved at any time before the commencement of the Amendment Act, 1936, the transferee company may, on application made to Court within two months thereafter, be authorized to give notice as aforesaid at any time within 14 days of the order. The procedure then to be followed is the same as in the first case except that the Court may by the same order direct any other terms for acquiring the shares of the dissenting shareholders than those provided by the scheme or contract.

On the expiration of one month since the giving of the notice, or where an application made by any dissentient holder is then pending, after the disposal of such application unless the Court has ordered to the contrary, the transferee company must transmit a copy of the notice to the transferor company and pay or transfer to it the amount or other consideration representing the price for the shares agreed to be acquired. The transferor company should thereupon register the transferee company as the holder of those shares.

The transferor company must pay the amount received into a separate bank account to be held on trust for the holders of the shares sold.

It will be noticed that these provisions would be of great help in cases where a small minority of shareholders choose to hamper an otherwise beneficial scheme by refusing to sell their shares.

### Summary

The foregoing provisions of ss. 153A and 153B, it would be clear, point to two kinds of schemes of reconstruction and amalgamation. The first kind is the result of an agreement to sell the undertaking of the company to another company. In such a case, the scheme not only requires to be sanctioned by the Court under s. 153 but, if sanctioned, will also have the assistance of the Court in carrying it through without formally taking the company into liquidation. The second kind involves a transfer of the company's undertaking by sale of its shares to another company. The section itself lays down the procedure for acquisition of such shares by the transferee company in pursuance of the scheme or contract and obviates the necessity of going to the Court either for its sanction or for helping the scheme through. In fact, Court's sanction is not needed in such a case as the shareholders themselves may throw the scheme overboard if they do not approve of it. This kind of scheme, too, does not require the company to be wound up.

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## LECTURE XIII

### PRIVATE, FOREIGN AND OTHER COMPANIES

*Private companies—One Man's company—Conversion of a Private company into a Public company and vice versa—Subsidiary companies—Foreign companies—Joint Stock and other companies authorised to register—Registration of Unlimited company as Limited.*

#### PRIVATE COMPANIES

As stated at the end of the first lecture, every one of the companies contemplated by the Act may be either private or public. We have dealt in detail in the preceding lectures with the formation, management and administration of a public company. It has, however, been pointed out in course of those lectures which of the provisions dealt with therein do not apply to private companies. Those references are grouped here in order that one may be able to follow them without much difficulty.

A 'private company' is defined by cl. (13) of s. 2 (1) of the Act which is newly substituted by the Amendment Act, 1936, with a view to effect a few changes in the wording of the clause. It means a company which by its articles:—

- (a) restricts the right to transfer the shares, if any; and
- (b) limits the number of its members (exclusive of persons who are in the employment of the company) to fifty; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company; provided that where two or more persons hold one or more shares jointly, they shall, for the purposes of this definition, be considered as a single member.

Section 5 of the Act prescribes the minimum number of persons who may form a private company as two and not seven as in the case of a public company.

Private companies were for the first time introduced in the Indian Company law by the present Act. Prior to that, they were on the same footing as public companies and did not enjoy the privileges which are conferred on them by the present Act. The principal advantage of these companies which are generally family concerns is to secure absolute privacy as regards their affairs and at the same time to have the liability of their members limited either by shares or guarantee. It should be borne in mind that the main characteristic of a private company is that it cannot invite the public to subscribe for its shares. Usually all the shares of a private company, if it be a concern limited by shares, are held by a few persons, who are, more often than not, members of the same family.

### Privileges

It may be said that private companies are governed by the same rules as public companies and the Act as a whole applies to them in the same way as to the others except as regards certain specified matters. We will, therefore, only enumerate what a private company is not required to do as against what a public company is so required under the various provisions of the Act and they will be regarded as special privileges which the Act confers on a private company.

(1) Out of the regulations of Table A which are made compulsorily applicable to public companies under the amended s. 17 of the Act, regulations 78, 79, 80, 81 and 82 shall not be deemed to be included in the articles of a private company unless it is a subsidiary company of a public company. [First Proviso to s. 17 (2) as amended by Act II of 1938].

(2) A private company can commence business immediately on incorporation, and it need not go through the formalities laid down in s. 103 which expressly excludes such company from its purview.

(3) It need not have any directors (though generally it does have). (S. 83A.)

(4) If there be a director, his consent in writing to act as such and his contract to take up qualification shares need not be filed with the Registrar, nor is it necessary for him to sign the memorandum for any qualification shares. (S. 84).

(5) It need not issue or file with the Registrar a prospectus or a statement in lieu of prospectus. (S. 98.)

(6) It can commence allotment before the minimum subscription is subscribed or paid. (S. 101.)

(7) Prior to the Amendment Act, 1936, it did not have to file its statutory report with the Registrar though it had to hold a statutory meeting. But, under the new s. 77, none of its provisions applies to it.

(8) Provisions of s. 91D requiring an agent of the company, who makes a contract in his own name with the company as the undisclosed principal, to make a memorandum of the contract and to perform some other acts in connection therewith do not apply to private companies.

(9) A director of a private company can vote on a contract in which he is interested (S. 91B)

(10) It need not file with the Registrar or send to its members its balance sheet and auditor's report. (S. 131.)

(11) It may employ an uncertified auditor, as also any person in the employ of its director or officer as an auditor. (S. 144.)

(12) Holders of preference shares and debentures in private companies are not entitled to receive and inspect balance sheet and auditor's report, unless so permitted by the articles. (S. 146.)

### Conditions of privileges

It must be noted that these privileges are available to a private company so long as it continues to observe the limitations and restrictions placed upon it by the Act. A question may be asked as to what would be the result if a private company were to cease to observe them. Will it necessarily thereby turn itself into a public company? According to Palmer, the company did not cease to be a private company in these circumstances, and his view was corroborated by a judicial decision in *Park v. Royalties Syndicate, Ltd.*, (1912) 1 K. E. 330.

But the new English Companies Act, 1929, now provides in s. 27 (3) that where a company is a private company under the provisions of s. 26 of the Act, and default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in s. 28 (prohibition of carrying on business with fewer than two members), s. 110 (3) (inclusion of the balance sheet in the annual return), s. 130 (1) (members' right to receive copies of balance sheet and auditor's report) and s. 168 (4) (liability to be wound up if the number of its members is below two). The proviso to s. 27 (3), however, makes provision for relieving the company from these consequences if on an application of the company

or any other person interested the Court is satisfied that the default was accidental or due to inadvertence or some other just cause.

In India, too, the Amendment Act, 1936, introduces a similar provision in cl. (3) of the new s. 154 which is a reproduction of the English section except that the private company in default under the former shall be debarred from enjoying any of the privileges and immunities conferred on private companies by the various provisions of the Act.

### Consequences of membership below the minimum

One more provision may be noted here. If a private company at any time during its continuance has the number of its members below two, every member thereof who continues to do business, with knowledge of the fact, for more than six months thereafter becomes liable for all the debts of the company contracted after the period of six months, without the right to join others with him to share his liability. The Court may also wind up the company in such a case. Similar provisions apply in the case of a public company whose number of members falls below seven at any time while it is a going concern. (S. 147).

### ONE MAN'S COMPANY

Sometimes, a company is formed in which only one man who is the owner of a business holds the entire bulk of the capital in the form of fully paid-up shares with a few extra members holding one share each, but, truly speaking, they are no more than dummies or nominees of the former. The former owner of the business is thereby enabled to do his business with limited liability. This sort of company is often called a 'one man company'. Thousands of such companies were formed in England in the past and, until the year 1894, no doubt was raised as to their legality. In that year, however, the Court of Appeal impeached the legality of a company constituted on these lines in **Broderip v. Salomon**, (1895) 2 Ch. 323 on the ground that the Act contemplated the incorporation of seven independent *bona fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before when he was a sole trader, and that to legalise such transaction would be a scandal. But the House of Lords rejected this view on appeal as entirely erroneous and unsound. **Salomon v. Salomon & Co.**, (1897) A. C. 22. It was there held that the company whose legal status was impeached was properly constituted inasmuch as there were seven members each of whom held at least one share, and that was the sole condition imposed by the Act, and that there was nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that

such a company was not properly constituted because some or one of the seven members happened to hold relatively small or a relatively large number of shares. The result, therefore, is that, even in India, such companies, public or private, are to be deemed to have been properly constituted and their legality would be unimpeachable.

### CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY

Cl. (1) of the new s. 154 of the Act provides for the mode in which a private company may be converted into a public company.

If a private company alters its articles so as not to include the provisions of cl. (13) of s. 2 (1) of the Act, it shall as on the date of the alteration, cease to be private company, and must, within 14 days thereafter, file with the Registrar a prospectus or a statement in lieu of prospectus in the form marked II in the second Schedule. In case of default, the company and every officer wilfully a party thereto shall be liable to a fine to the extent of Rs 500

### CONVERSION OF A PUBLIC COMPANY INTO A PRIVATE COMPANY

In a similar way, a public company may turn itself into a private company within the meaning of s. 2 (1) (13) of the Act. It has to pass a special resolution altering its articles so as to incorporate the restrictions, limitations and prohibitions imposed by the Act. The articles must also be generally considered and all necessary alterations must be effected. It may be noted here that the Act itself does not empower a public company to turn itself into a private company, but it does not prohibit any such conversion. In *re Radiant Chemical Co., Ltd.*, 22 Pat. 204.

### SUBSIDIARY COMPANIES

It has been stated at the end of the first lecture that a new form of companies called 'subsidiary companies' has been brought within the purview of the Act by the Amendment Act of 1936. Sub-sec. (2) of s. 2 states when a company, whether incorporated under the Act or not, shall be deemed to be a subsidiary company. Such a company is not one of a distinct class of companies as are found under the Act, nor does the sub-section profess to define how such a company may be formed. It is only a company of any form whatever which shall be presumed to be a company *subsidiary* to another company, public or private, within the meaning of the Act, by reason of its certain relations with the latter. These relations are formulated in the sub-section by way of conditions and, on the fulfilment of of those conditions, one of the two companies is to be deemed to be subsidiary to the other.

(a) Where the assets of a company (under the Act) consist wholly or partly of shares in another company of whatever kind, whether held directly or indirectly through a nominee, and (b) the amount of shares so held is at the time of making up the accounts of the holding company more than 50 per cent of the issued share capital of that other company or such as to entitle the holding company to more than 50 per cent of the voting power in that company, or the company has power directly or indirectly to appoint the majority of the directors of that other company (such power not being one vested in it by virtue only of the debenture trust deed), then that other company shall be deemed to be a 'subsidiary company' within the meaning of the Act. The expression shall also include a subsidiary company of a subsidiary company.

The sub-section, however, provides one exception to the rule. Where a company under the Act has as its ordinary business the lending of money and holds shares in another company as security only, no account shall be taken of the shares so held for the purpose of determining whether that other company is or is not a subsidiary company.

It has been noted in the foregoing lectures that various provisions of the Act which do not apply to private companies have been made applicable to companies which are subsidiary to public companies. It is, therefore, needless to mention those and other provisions applicable to such companies over again at this stage.

It may, however, be noticed that the provisions in regard to such companies have been necessitated by the peculiar trade conditions in this country. Their principal object seems to be to clear up from time to time the financial position of public companies which bear relations to other companies of the kind mentioned in the sub-section for the benefit of their shareholders and creditors.

## FOREIGN COMPANIES

The Act lays down certain requirements to be observed by companies which are incorporated in foreign countries and which also have offices and places of business in this country. On observance of these requirements, such companies come within the purview of the Indian Companies Act and, therefore, all provisions which would apply to companies established and incorporated in this country under the Act would equally apply to such foreign companies. These requirements, however, need not be complied with before a foreign company can maintain a suit in British India. *Shamrao v. United House Building Society (India), Ltd.*, 38 Bom. L. R. 1092.

These requirements are embodied in section 277 of the Act. Every foreign company which at the commencement of the Act has a place of business in British India, or which establishes such a place of business after the commencement of the Act, shall, within six

months from the commencement of the Act or within one month from the establishment of such place of business, as the case may be, file with the Registrar, in a province in which such place of business is situated,—

(a) a certified copy of the charter, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company and, if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any);

(d) the names and addresses of some one or more persons resident in British India authorized to accept on behalf of the company service of process and any notices required to be served on the company; and

(e) the full address of the principal place of business of the Company in British India (added by Act II of 1938)

In the case of any alteration in any one of the above-mentioned particulars, the company is required to file with the Registrar a notice of such alteration within the prescribed time.

Further, every such foreign company is required to file with the Registrar every year three copies of its balance sheet if it is required by law to be filed with the public authority in the country of its incorporation. Where no balance sheet is required to be filed with such public authority, such a statement in the form of a balance sheet should be filed in triplicate as would be required to be filed under this Act if such company were formed and registered under this Act.

There is a further duty imposed on such companies, viz. that where a foreign company comes within the purview of the section (277) and uses the word "limited" as part of its name, it shall

(a) conspicuously exhibit on its place of business in British India the name of the company and the country in which it is incorporated in English characters, and also in one of the vernacular characters if such place of business is beyond the ordinary original civil jurisdiction of a High Court;

(b) have the name of the company and country of its incorporation mentioned in English characters in all bill-heads and letter paper and all notices, advertisements and other official publications thereof; and

(c) state the name of the country of its incorporation in every prospectus inviting subscriptions for its shares or debentures in British India.

If the liability of its members is limited, notice of that fact should be also stated in every prospectus, bill-heads and official



(a) Where the assets of a company (under the Act) consist wholly or partly of shares in another company of whatever kind, whether held directly or indirectly through a nominee, and (b) the amount of shares so held is at the time of making up the accounts of the holding company more than 50 per cent of the issued share capital of that other company or such as to entitle the holding company to more than 50 per cent of the voting power in that company, or the company has power directly or indirectly to appoint the majority of the directors of that other company (such power not being one vested in it by virtue only of the debenture trust deed), then that other company shall be deemed to be a 'subsidiary company' within the meaning of the Act. The expression shall also include a subsidiary company of a subsidiary company.

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It has been noted in the foregoing lectures that various provisions of the Act which do not apply to private companies, have been made applicable to companies which are subsidiary to public companies. It is, therefore, needless to mention those and other provisions applicable to such companies over again at this stage.

It may, however, be noticed that the provisions in regard to such companies have been necessitated by the peculiar trade conditions in this country. Their principal object seems to be to clear up from time to time the financial position of public companies which bear relations to other companies of the kind mentioned in the sub-section for the benefit of their shareholders and creditors.

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months from the commencement of the Act or within one month from the establishment of such place of business, as the case may be, file with the Registrar, in a province in which such place of business is situated,—

(a) a certified copy of the charter, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company and, if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any),

(d) the names and addresses of some one or more persons resident in British India authorized to accept on behalf of the company service of process and any notices required to be served on the company; and

(e) the full address of the principal place of business of the Company in British India (added by Act II of 1938).

In the case of any alteration in any one of the above-mentioned particulars, the company is required to file with the Registrar a notice of such alteration within the prescribed time

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(b) have the name of the company and country of its incorporation mentioned in English characters in all bill-heads and letter paper and all notices, advertisements and other official publications thereof; and

(c) state the name of the country of its incorporation in every prospectus inviting subscriptions for its shares or debentures in British India.

If the liability of its members is limited, notice of that fact should be also stated in every prospectus, bill-heads and official

publications of the company in British India and affixed on every place where it carries on business

The section also contains a penalty clause for the company and every officer or agent of the company for default in complying with any of the above requirements

A fee of five rupees or such smaller amount as may be prescribed has to be paid to the Registrar for registering any document required by this section to be filed with him

The Amendment Act 1936 adds some more provisions to those already mentioned in regard to foreign companies. They are in the nature of restrictions on their powers of management. Sections 277A to 277E contain these provisions

#### **Restriction on sale and offer for sale of shares**

S 277A prescribes a restriction on sale and offer for sale of shares in a foreign company. It declares illegal for any person to issue, circulate, or distribute in British India any prospectus offering for subscription shares in or debentures of a foreign company incorporated or to be incorporated irrespective of whether it has or has not established, or will or will not establish a place of business in British India unless (i) a copy thereof certified by the chairman and two other directors of the company and having been approved by a resolution of the managing body has been previously delivered to the Registrar for registration (ii) the prospectus states on the face of it that it has been so delivered and (iii) the prospectus is dated. It similarly declares illegal for any person to issue to any one in British India a form of application for shares in or debentures of such a company or intended company and if the form is issued with the prospectus. These provisions however do not apply to a prospectus or form of application issued to the existing members or debenture-holders of such company. Otherwise they shall apply whether the prospectus or form of application be issued on or after the formation of the company. A prospectus under this section also includes the document which by virtue of the new s 98A is to be deemed a prospectus. In fact the expressions 'prospectus', 'shares' and 'debentures' in this and the next section have the same meanings as when used in relation to a company under the Act.

If a person contravenes any of these provisions, the section also provides a penalty of fine to the extent of Rs. 5000

#### **Requirements as to prospectus**

S 277B requires specific particulars to be mentioned in the prospectus to be issued by an existing or intended foreign company in British India. They are with respect to—(i) the objects of the company; (ii) the instrument constituting or defining the constitution of the company, (iii) the law under which it was incorporated, (iv) the place where the said instrument enactment or copies thereof can

be inspected; (v) the date and the country of incorporation; and (vi) whether there is a place of business in British India and, if so, the address of its principal office

The provisions of cls. (i) to (iii) shall not apply where the prospectus is issued two years after the company became entitled to commence business.

It will be noted that these particulars are in addition to those required to be specified in a prospectus to be issued by any company incorporated under the Act. Further, the liability for non-compliance with or contravention of any of these provisions is the same as under s. 97 and s. 93 (5).

#### **Restriction on canvassing for sale of shares**

S. 277C declares it illegal for any person to go from house to house offering shares of a foreign company for subscription or purchase to the public or any member of the public. 'House' here does not mean an office for business purposes. Any person who contravenes this provision would be liable to a fine to the extent of Rs. 100.

#### **Registration of charges, etc.**

S. 277D, which is renumbered as sub-sec. (1) by the Amendment Act II of 1938 along with two provisos inserted by it, provides for the application of ss. 109 to 117, and 120 to 125 to charges on properties in British India created and to charges on property in British India which is acquired after the commencement of the Amendment Act, 1936, by a foreign company having an established place of business in British India. Sub-sec. (2) after over a year of the enactment of this section provides that the latter [now sub-sec. (1)] shall not be deemed to come into force until the commencement of the Amendment Act II of 1938 which introduced this sub-section itself.

Similarly, the last section 277E to which also a proviso is added by the above Amendment Act provides for the application of ss. 118 and 119 of the Act regarding notice of appointment of a receiver and the account to be filed by receiver to all foreign companies having an established place of business in British India. The same section also makes s. 130 of the Act applicable to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to their business in British India.

#### **JOINT STOCK AND OTHER COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT**

Sections 253 to 269 enumerate the companies other than those formed in pursuance of the Act which are authorized to register

under the Act and provide rules for such registration and the effect thereof.

(1) Any company consisting of seven or more members existing on the 1st of May, 1882, including any company registered under Act XIX of 1857 and Act VII of 1860 or either of them, and (ii) any company formed after the aforesaid date in pursuance of any Act of Parliament (or Indian law other than this Act), or of Letters Patent or being otherwise duly constituted according to law and consisting of seven or more members, may register itself under this Act as one of the three kinds of companies contemplated by it. But (a) a company falling under any of the classes mentioned in (ii) which is already limited and not being a Joint Stock Company shall not register under this Act, (b) a similar company shall not register as an unlimited company or company limited by guarantee, (c) a company which is not a Joint Stock company shall not register as one limited by shares, (d) a company whose liability is not limited by Act of Parliament or Indian law or by Letters Patent may register as a limited company under the section with the assent of a majority of not less than three-fourths of the members present in person or by proxy at the general meeting summoned for the purpose (e) a company entitled to be registered under the section shall not register without the assent of a simple majority of members present as aforesaid, and (f) where a company is about to register as one limited by guarantee, the aforesaid assent must be accompanied by a resolution that each member undertakes to contribute to the assets of the company as a present or past member such amount as may be required not exceeding a specified amount for payment of the debts and liabilities of the company contracted before he ceased to be a member and of the costs and expenses of winding up and for the adjustment of the rights of the contributors among themselves. In computing the majority under clauses (d) and (e) above when a poll is demanded every vote to which a member is entitled according to the articles shall be counted. A company registered under the Act of 1882 shall not be registered in pursuance of the above provisions. (S 253)

### Modes of registration

A "Joint Stock" company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares also of fixed amount, or held and transferable as stock or divided and held partly in one way and partly in the other and formed on the principle of having for its members the holders of those shares or that stock and no other persons, and such a company, when registered with limited liability under this Act shall be deemed to be a company limited by shares. (S 254) Following documents should be delivered to the Registrar before such a com-

pany could be registered: (1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not more than six clear days before the day of registration, were members of the company, with the addition of shares or stock held by them respectively, distinguishing, where shares are numbered, each share by its number; (2) a copy of an Act of Parliament, or Indian law, Royal Charter Letters Patent, deed of settlement, contract of co-partnership or other instrument constituting or regulating the company; and (3) if the company is intended to be registered as a limited company, a statement specifying (a) the nominal share capital and the number of shares into which it is divided or the amount of stock of which it consists, (b) the number of shares taken and the amount paid on each share, (c) the name of the company with the addition of the word "Limited," as the last word thereof, and (d) in the case of a company intended to be registered as one limited by guarantee, the resolution declaring the amount of the guarantee (S 255)

Following documents should be delivered to the Registrar before any company other than a Joint Stock Company could be registered in pursuance of s 253 stated above: (1) a list of the names, addresses and occupations of the directors, and (2) a copy of any Act of Parliament or other instrument constituting or regulating the company. In the case of a company of this kind intended to be registered as one limited by guarantee, a copy of the resolution declaring the amount of the guarantee should also be filed. (S 256)

Section 257 requires that every one of the documents which are required to be filed as above should be duly verified by two or more directors or other principal officers of the company. The Registrar may call for evidence to show that the company proposing to be registered is a Joint Stock company as defined above (S 258). On compliance with these requirements and payment of necessary fees which shall not be chargeable to a company which is not to be registered as a limited company, or whose liability is limited, before its registration as a limited company, by some Act of Parliament or Indian law or by Letters Patent, the Registrar issues a certificate of incorporation whereupon the company becomes entitled to have perpetual succession and a common seal (Ss. 260 and 262)

But such certificate cannot have any effect in the case of a banking company existing on the 1st of May, 1882, and registered with limited liability under these provisions as against a person having an account with the bank, if the company omits to give at least 30 days' notice to him of its intention to register as a limited company under the Act (S 259)

#### Effect of registration

On registration, all property of every kind and all interests and rights in, to and out of such properties including obligations and

actionable claims belonging to the company at the date of the registration under the aforesaid provisions pass to and vest in the company as incorporated (s. 263). But the registration shall not affect the rights and liabilities of the company in respect of any debt or obligation incurred or contract entered into by, to, with or on behalf of, the company before registration (s. 264). Similarly, all proceedings of a legal nature pending by or against the company, or the public officer or any member thereof, at the time of registration may be continued as if no registration had taken place. But any decree or order obtained in consequence of such proceedings shall not be executed against any individual member of the company; however, in the event of the property and effects of the company being found insufficient to satisfy the decree or order, an order may be obtained for winding up of the company. (S 265)

Other effects of registration of a company under the aforesaid provisions are stated in section 266. They are (1) all provisions contained in any Act of Parliament or other instrument constituting or regulating the company including, in the case of a company registered as one limited by guarantee, the resolution declaring the amount of guarantee, are to be deemed as conditions and regulations of the company in the same manner and with the same incidents as if the company was formed under the Act, and such provisions were included in its memorandum and articles, (2) all the provisions of the Act apply to such company subject as follows: (a) Table "A" will not apply unless adopted by a special resolution; (b) provisions as to the numbering of shares will not apply to any Joint Stock company whose shares are not numbered, (c) the provisions contained in any Act of Parliament or Indian law cannot be altered, but those in the Letters Patent may be altered with the sanction of the Central Government; (d) but provisions in a Royal Charter or Letters Patent cannot be altered with respect to the objects of the company; (e) in the event of the company being wound up, every person who is liable for debts and liabilities contracted before registration shall be a contributory in respect of such debts and liabilities, and as such, he shall be liable to contribute in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid, and in the event of the death or insolvency of any contributory, the provisions of the Act with respect to the heirs and legal representatives of deceased contributories and with reference to the assigns of insolvent contributories shall apply; (3) the provisions of the Act as to (a) the registration of an unlimited company as limited, (b) the power of such company on being registered as limited to increase its nominal share capital and to provide for a reserve capital; and (c) the power of a limited company to set aside a certain portion of its capital as a reserve capital, apply notwithstanding any provisions contained in any Act of Parliament. . .

or other instrument constituting or regulating the company, (4) provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company as would, if the company had originally been formed under the Act, have been required to be contained in the memorandum and are not authorized to be altered under the Act cannot be altered, and (5) nothing in this section shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament or other instrument constituting or regulating the company be vested in the company.

A company registered under the aforesaid provisions may by special resolution alter its constitution by substituting a memorandum and articles for a deed of settlement which includes any contract of co-partnery or other instrument regulating or constituting the company, not being an Act of Parliament or Indian law, a Royal Charter or Letters Patent. Where such alteration is made, it has to be confirmed by the Court and a printed copy of the substituted memorandum and articles should be filed with the Registrar. An alteration of the above nature may also be accompanied by an alteration of the company made in pursuance of the provisions under the Act (S 267).

Finally the Court may stay or restrain besides the proceedings against the company proceedings against a contributory on an application by a creditor after the presentation of a winding up petition and before a winding-up order is made. After such order no suit or proceedings can be commenced or proceeded with against the company or any contributory in respect of any debt of the company except by leave of the Court and subject to such terms as the Court may impose (Ss 268 and 269).

### REGISTRATION OF UNLIMITED COMPANY AS LIMITED

A company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act but the registration in case of the former shall not affect the liabilities incurred by the company as an unlimited company prior to its registration. The effect of registration is to make it a limited company as regards liabilities incurred subsequent to its registration as a limited company (S 67). The next section gives power to unlimited companies having a share capital to provide for reserve share capital on registration as a limited company. In pursuance of the power it can do either of the two following things by its resolution for registration as a limited company —

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares but subject to the con-



dition that no part of the increase shall be called up except in the event of the company being wound up; or

(b) provide that specific part of its uncalled share capital shall not be capable of being called up except in the event of the company being wound up.

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## LECTURE XIV

### MODES OF WINDING UP

*What is Winding up—Modes of Winding up—Compulsory Winding up Who may petition—Procedure in Compulsory Winding up—Voluntary Winding up—General Procedure in Voluntary Winding up—Compulsory Winding up pending Voluntary one—Arrangement with creditors—Amalgamation and Reconstruction—Winding up under Supervision of the Court—Effect and Advantages of a Supervision Order.*

#### WHAT IS WINDING UP?

The winding-up or liquidation of a company is a proceeding in which all its affairs are wound up, its rights and liabilities ascertained, and the claims of its creditors paid off out of the assets of the company including the contributions by its members to the extent to which they may be necessary. If any surplus assets are left, they are divided among the members of the company in proportion to their rights under the articles. This being done, the company is dissolved on compliance with the requisite formalities prescribed by the Act.

But a question may be raised whether a company may be wound up or carried into liquidation at any time, or only under the circumstances in which an individual may be adjudged insolvent under the Insolvency Acts.

In answer to this question, it must be clearly borne in mind that winding up of a company is not the same thing as the bankruptcy of a company. For the general rule in regard to winding up is that if the members of a company desire that the company should be dissolved or if it becomes insolvent or is otherwise unable to pay its debts, or if for any reason it seems desirable that it should be cease to exist, it is wound up. It will, therefore, be obvious that a company may be wound up even when it is perfectly solvent, e.g., for the purposes of reconstruction. Furthermore, a company can never be declared bankrupt although it is unable to pay its debts. It can only be wound up, though, of course some provisions of Insolvency law are made applicable to companies in liquidation. (See

ss. 169, 171, 195, 196 and 227 to 232 of the Companies Act). We may, therefore, put the position thus, viz., that, in so far as inability to pay debts is concerned a bankruptcy of an individual under the Insolvency law is the same thing as a winding-up of a company under the Company Law but a company can also be wound up for reasons other than mere inability to pay its debts

### MODES OF WINDING UP

Now a company can be wound up either (1) compulsorily by the Court or (2) voluntarily, or (3) under the supervision of the Court.

Section 155 of the Act lays down these three methods of winding up and provides that the provisions of the Act with respect to winding up shall apply, unless the contrary appears, to the winding up of a company in any of these three modes

In every winding-up, a Liquidator or Liquidators are appointed to administer the property of the company and he or they must apply the assets of the company, first, in the payment of the creditors in their proper order and then in distributing the residue among the members according to their rights

### COMPULSORY WINDING UP BY COURT

A company may be wound up by the Court when (i) it has passed a special resolution to be wound up by the Court, (ii) default is made in filing the statutory report or holding the statutory meeting, or (iii) it does not commence business within a year from its incorporation or suspends business for a year, or (iv) the number of its members falls below seven (in case of a private company, below two); or (v) it is unable to pay its debts, or (vi) the Court is of opinion that it is just and equitable that it should be wound up (s. 162).

(i) A company may be wound up for any cause whatever under this clause if it passes a special resolution to that effect

For clause (ii), see p. 137 *ante*

As regards clause (iii), it must be carefully noted that the power of the Court to wind up a company which has not carried on business for a year is discretionary and will not be exercised unless there are indications that the company has no intention of continuing its business. Similarly, if the suspension of its business for a year is well accounted for and appears to be due to temporary or unavoidable causes, the Court will not order a winding-up. In *re Capital Fire Insurance Association*, 24 Ch D 408. Further, a company will not be wound up because it has ceased to carry on one of its several businesses unless that business is the main object of the company. *Re Amalgamated Syndicate*, (1897) 2 Ch. 600.

Similarly, a company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company. In such a case, the proper course is to move the Registrar to strike the company's name off the register as a defunct company. *In re National Finance Co.*, (1866) W N 243.

Under clause (iv) a company is generally wound up voluntarily, and it is not very frequently that the Court orders the winding-up under this clause.

In regard to clause (v) we have to consider when a company should be deemed to be unable to pay its debts. S 163 of the Act lays down specific instances when the company shall be deemed unable to pay its debts. They are —

(1) if a creditor by assignment or otherwise to whom the company owes a sum exceeding Rs 500 then due has served on the company a demand for payment and the company has for three weeks thereafter neglected to pay it or to secure or compound for it to the reasonable satisfaction of the creditor.

(2) if execution or other process issued on a decree or order of any Court in favour of a creditor is returned by the company unsatisfied in whole or in part.

(3) if it is proved to the satisfaction of the Court that the company cannot pay its debts and in determining whether it is unable to pay its debts the Court shall take into account the contingent or prospective liabilities of the company.

If any of these instances be proved the company must be compulsorily wound up by the Court. If the debt is disputed no order for winding up can be made. But if it is not the Court may under (3) above be satisfied that the company cannot pay its debts and order the company to be wound up however small such debt may be. In such a case it is neither necessary that a demand should have been made nor execution levied. Thus in *Re Globe Steel Co* 2 Eq 337 the Company accepted a bill of exchange in part payment for goods bought. No demand had been made or execution levied. The bill was dishonoured. It was held that it was sufficient proof of the company's inability to pay its debts. The Court under this clause has really to see whether the company is "commercially insolvent" which expression has been defined in *re European Life Assurance Society* L R 9 Eq 122 by Sir James William V C to mean

Not in any technical sense but plainly and commercially insolvent that is to say that its assets are such and its existing liabilities are such as to make it reasonably certain as to make the Court feel satisfied—that at the existing and probable assets would be insufficient to meet the existing liabilities.

This definition was recently adopted by the Bombay High Court in **Re Cine Industries & Recording Co. Ltd.**, 44 Bom. L. R. 387. Further, it should be noted that a creditor having a claim for less than Rs 500 can also move the Court under cl. (3). It is only when he wants to proceed under cl. (1) that the formalities stated therein should be complied with. Similarly, if it could be clearly shown that the company cannot possibly make profit, a winding-up order would be made although it might have valuable assets. **Re Factage Parisien**, explained, 2 Ch. App. at pp 745 and 747. The company in this case was carrying on its business at a loss, and was paying its debts by making new calls on the members. It was held that the company may be wound up. It was there observed

If they are carrying on business at a manifest loss, and it is totally impossible to make any profits, it can scarcely be said that this Court will consider it just and equitable that the company should be allowed to continue when people who have contributed property to a considerable amount in it do not wish it to go on. It is quite distinct from saying that it is an insolvent company or that it cannot pay its debts, because the persons managing it will take care to have all the debts paid by making calls to meet them."

Cl. (vi) of section 162 is the most general clause under which petitions for compulsory winding up are usually made. The words 'just and equitable' in the clause are not to be construed *eiusdem generis* as it was at one time held. **Sailing-ship "Kentmere,"** (1897) W. N. 58. They are words of widest significance and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances. In **re Standard Aluminium and Brass Works**, 30 Bom. L. R. 509. The Court, however, will not make the order for winding up unless there is some special reason for so doing, so much so that even general, as distinct from specific, charges of fraud are not usually sufficient for making such order. In fact, the Court will not exercise its jurisdiction under this clause unless some wrong has been done to the company, and the company is deprived of its remedies in respect of it by the improper use of voting power of the shareholders, or the substratum of the company has gone, or it is impossible, owing to the way in which the voting power is held and to the feelings of the directors towards each other, for the business of the company to be carried on. **Anglo-Continental Produce Co., In re**, (1939) 1 A. F. R. 99. The cases usually coming under this clause are, therefore, cases of deadlock in the management, where the substratum of the company is gone and cases of fraud and of oppression of a minority by the majority. In **re Janbazar Manna Estate Ltd.**, 58 Cal 716. The substratum of a company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, or (d) the existing and possible

assets are insufficient to meet the existing liabilities of the company. **In re Cine Industries & Recording Co. Ltd.**, (*supra*); **Re Baku Consolidated Oilfields, Ltd.**, (1944) 1 A. E. R. 24. In **Murlidhar v. Bengal Steamship Co.**, 47 Cal. 654, the deadlock could not be proved because the company had appointed other managing agents in place of the first ones whose firm was dissolved. **In Re Yenidje Tobacco Co.**, (1916) 2 Ch. 426, the company was ordered to be wound up as the company could not conduct its business by reason of its two directors who were also the only shareholders not being on speaking terms with each other. Where allegations of dishonesty were made by the directors against each other in respect of defalcations of certain of the company's funds, the company was ordered to be wound up on the ground that it was a case in which the conduct of some of the officers of the company required an investigation which could only be obtained in a winding-up by the Court. **In re Varieties, Ltd.**, (1893) 2 Ch. 235; **In re Haycraft Gold etc. Co.**, (1900) 2 Ch. 230. Similarly, where the object of a company is fraudulent, the company may be wound up by the Court. **Re Brinsmead & Sons**, (1897) 1 Ch. 45. But the fact that the managing directors had a preponderating voice in the company by reason of their owning or controlling a large number of shares, or that the dividends had not been paid regularly was of itself no reason for winding up the company. Similarly, the fact that a company is working at a loss is by itself no ground for winding it up especially when not a single shareholder has come forward to support the petition for winding up. **New State of Insurance Co. Ltd. v. Superintendent of Insurance**, A. I. R. (1943), Lah. 109. In the case of a private company, the principles to guide the Court in determining whether or not a winding-up order should be made are those which apply to determining whether or not a partnership should be wound up. Accordingly, where a father and two of his sons were the only shareholders of the company and, on the father's death, the latter in exercise of their discretion under the articles refused to register the transfer of their father's shares in the name of their three other brothers to whom they were bequeathed by the father, it was no ground for winding up the company. **Cuthbert Cooper & Sons, Ltd.**, **In re**, (1937) Ch. 392. A lack of confidence in the management of the company's affairs by the directors may, however, justify the winding-up order under this clause. Merely an *ultra vires* transaction on the part of the directors is of itself no ground for a winding up order. **Ripon Press Co. Ltd.**, v. **Gopal**, 61 M. L. J. 783 (P. C.).

### WHO MAY PETITION?

An order for winding up of a company is made by the Court on a petition made to it. S. 166 of the Act enumerates the persons who

can make such petition. They are: (1) the company, (2) any creditor or creditors (including any contingent or prospective creditor or creditors), (3) a contributory or contributories, (4) all or any of those parties, together or separately, and (5) the Registrar. A policy holder in a life insurance company cannot apply to wind up the company as he is neither a contributory nor a creditor of the company. *In re Aryan Life Assurance Society, Ltd.*, 40 Bom. L. R. 52.

### Creditor's petition

The Court is usually bound to make an order for winding-up on the petition of a creditor if he can prove that he claims an undisputed debt and that any of the contingencies stated in s. 162 has arisen to justify such order. The order may, however, be refused for special reasons, e.g., where the Court finds that the majority of creditors do not want it. *Re Ilfracombe Building Society*, (1901) 1 Ch. 102; *In re Cine Industries & Recording Co. Ltd.*, (*supra*). Similarly, such order will not be made where it is not likely to do any good.

But the Court is not bound to make the order at once. It may direct the petition to stand over for some time if there is a possibility of the company making proper arrangements to meet its immediate liabilities and setting its business on an improved and sound basis. *Re Brighton Hotel Co.*, 6 Eq. 339.

It has been stated above that if the debt of a petitioning creditor is disputed, no order for winding up can be made. But the Court in such a case may order the petition to stand over until the validity of the debt is determined, or may dismiss the petition, and even restrain the creditor by injunction from bringing a threatened petition. *Niger Merchants' Co. v. Capper*, 18 Ch. D. 577n. A creditor whose debt is unliquidated cannot petition for winding up.

A debenture-holder may petition if the principal moneys are payable to him direct and not to the trustees of a debenture trust deed. But the order will be refused where the debenture-holder has power to appoint a receiver, and has not done so. *Re Exmouth Dock Co. Ltd.*, 17 Eq. 181.

Similarly, the assignee of a debt or a part of a debt can petition, but not a creditor of a third party who has by a garnishee order attached a debt due from the company to the third party.

The section also says that a contingent or a prospective creditor can petition, but in the proviso it is laid down that such petition shall not be heard unless security for costs has been given and a *prima facie* case for winding up has been established.

### Petition by Contributory.

Unlike the case of a creditor, the Court is not bound to make an order for winding up on a contributory's petition, and it may,

before making such order, consider the wishes of the creditors and other contributories for which purpose it may direct their meetings to be held. The Court will not make the order if the interest of the petitioning contributory is very small, and the majority of members do not wish the order to be made, or if the number of shareholders is very small. But such order would be made if the Court finds that there is something which requires investigation, e.g., the conduct of a director *Re Varieties Ltd.*, (1893) 2 Ch. 235. Similarly, an order for winding up will not be refused even if the company has no assets (s. 170), or because a voluntary winding-up has commenced if the interest of the contributory is prejudiced thereby. A contributory may also petition for winding up if the company makes default in filing the statutory report or holding the statutory meeting. A creditor cannot file such petition. And the petition by a contributory cannot be filed in this case before the expiration of 14 days after the last day on which such meeting ought to have been held.

But a contributory cannot petition unless (a) the number of members has become less than seven (or two in case of a private company), or (b) the shares in respect of which he is a contributory or some of them were originally allotted to him, or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up or have devolved on him through the death of a shareholder [S 166 prov. (1)]

#### Registrar's petition

The Registrar is also now entitled to present a petition for winding up under the amended s 165 of the Act on the one and only ground that from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under s 138 it appears that it is unable to pay its debts. But he can present the petition only after getting the sanction of the Central Government which shall not be given unless the company has first been afforded an opportunity of being heard

#### PROCEDURE IN COMPULSORY WINDING UP

A winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up (s. 168). And the order made on the petition by whomsoever presented operates in favour of all the creditors and contributories of the company as if it was made on the joint petition of a creditor and a contributory (s. 167). After the presentation of the petition and before making an order thereon, the Court may, at any time, on the application of the company, a creditor or a contributory, restrain any further proceedings in any suit or proceeding against the company on such terms as it may think fit (s. 169).

On hearing the petition, the Court may either (1) dismiss it with or without costs, or (2) adjourn it conditionally or otherwise, or (3) make any *interim* order or any other order that it deems just.

If the order of winding up is made, the Court may appoint a liquidator simultaneously or forthwith cause intimation thereof to be sent to the official receiver (s. 170). It may also settle the list of contributories, make calls, and determine any question arising in the winding up on the application of the liquidator. Further, after the order is made or a provisional liquidator is appointed, no suit or other legal proceedings shall be commenced or proceeded with against the company except with the leave of, and subject to such terms as may be imposed by, the Court (s. 171).

On the order being made, a copy thereof must be filed within a month with the Registrar by the company and the petitioner whereupon the Registrar notes it down in his books and notifies the fact of the order in the Official Gazette. Such order, again, operates as a notice of discharge to the servants of the company, except where the business of the company is continued (s. 172).

On satisfactory reasons being shown, the Court may also stay the winding up proceedings either altogether or for a limited time (s. 173). And further even after the company has been dissolved by virtue of an order of the Court made after all the affairs of the company are completely wound up under s. 194, the Court may, within two years, on the application of the liquidator or any person interested, make an order declaring the dissolution to have been void. Proceedings can then be taken as if the company had not been dissolved. The person who obtains the order avoiding the dissolution must file a copy thereof with the Registrar within 21 days (s. 243).

#### Powers of the Court

Several powers have been vested in the Court by the Act to be exercised after an order for winding up is made. It has to settle the list of contributories, rectify the register of members, if necessary, and cause the assets of the company to be collected and applied in discharge of its liabilities. It may require any person for the time being on the list of contributories, any trustee, receiver, banker, agent or officer of the company to pay, deliver, surrender or transfer forthwith or within such time as it may direct to the official liquidator, any money, property or documents in his hands to which the company is *prima facie* entitled, allow any contributory by way of set-off any money due to him or the estate which he represents from the company; make calls and order payment thereof by the contributories by what is called a "balance order" which may include calls made before the winding up and yet would not bar a regular suit in respect thereof; adjust the rights of the contributories among themselves; summon and examine any officer or person who may be



capable of giving information concerning the affairs of the company; order public examination of promoters, directors and any officers of the company on the application of the liquidator that, in his opinion, a fraud has been committed by any one of such persons in relation to the company, (*Sir Fazal Ibrahim Rahimtoola v. A. G. Desai*, 51 Bom L. R. 510) and lastly, cause a contributory absconding or removing any of his property to be arrested and his books, papers and movable property to be seized. These powers are in addition to any existing powers of instituting proceedings against any contributory or debtor of the company or his estate for the recovery of any call or other sums. (Ss. 184-193 and 195-198).

An appeal lies against any order or decision made or given in the matter of winding up of a company by the Court in the same manner and subject to the same conditions in, and subject to, which appeals may be had from any order or decision of the same Court in cases within its original jurisdiction (s. 202). It has been held that only a liquidator, a creditor or a contributory can appeal under this section. *Motilal Kanji & Co. v. N. M. Jhaveri*, 33 Bom. L. R. 1495.

## VOLUNTARY WINDING UP

A voluntary winding up of a company is vastly different from a compulsory winding up thereof. The object of a voluntary winding up is that the company and its creditors shall be left to settle their affairs without going to Court, but they may apply to the Court for any directions or orders if and when necessary.

A voluntary winding-up can be effected (1) when the period (if any) fixed for the duration of the company has come to an end, or an event upon which the company is to be dissolved has occurred, and the company has in general meeting passed an *ordinary resolution* to wind up; or (2) if the company by a *special resolution* resolves that the company be wound up voluntarily for any reason whatever; or (3) when the company has passed an *extraordinary resolution* that it cannot by reason of its liabilities carry on its business, and that it is expedient that the company be wound up. (S. 203).

In the last case, the notice calling the meeting must clearly state that it is proposed to wind-up the company because its liabilities prevent it from carrying on its business. *Silkstone Fall Colliery Co., In re*, 1 Ch. D. 38. If, in pursuance of a defective notice, an extraordinary resolution for winding-up be passed, the resolution itself will be bad.

It must be noticed that each of these three cases provides a different kind of resolution for the purpose of taking the company into voluntary liquidation. At any rate, notice of the resolution for winding-up (whether extraordinary or special) must be given by

the company within 10 days of the passing thereof by advertisement in the local Official Gazette and also in some newspapers circulating, if at all, in the district where the registered office of the company is situate (s. 206).

A voluntary winding-up commences at the time of the passing of the resolution authorising it (s. 204).

#### **Two classes of voluntary winding-up**

Following the English Companies Act, 1929, the Amendment Act, 1936, now divides voluntary winding-up into two classes: (a) shareholders' and (b) creditors', and lays down the procedure to be followed in each case. The case falls under (a) when the company is solvent and is able to pay its debts in full. In this case it is not necessary to consult the creditors or to call their meeting. The directors only make a declaration of solvency stating that, in their opinion, the company will be able to pay up its debts within 3 years from the commencement of the winding-up and then the company and the shareholders proceed to appoint their own liquidator and to wind-up the company. The declaration must be supported by a report of the company's auditors on the company's affairs and delivered to the Registrar before the notices of the meeting at which the resolution for winding up is to be proposed are sent out. Where, however, the company is not solvent and the directors do not file the declaration about its solvency, the creditors must be called in meeting on the same or next day after the resolution for voluntary winding-up is passed, then the creditors along with the shareholders appoint a liquidator or a committee of inspection and jointly carry out the liquidation. The new provisions bearing on these two classes of voluntary winding-up are embodied in ss. 208 to 218.

#### **(a) Members' voluntary winding-up**

Provisions contained in the new ss. 208A to 208E affect a winding up resolved upon by the members of a company.

Firstly, the company in general meeting must appoint one or more liquidators for winding-up the affairs of the company and fix his or their remuneration. On such appointment, all the powers of the directors of the company come to an end except in so far as the company in general meeting, or the liquidator, sanctions the continuance thereof. (S. 208A) These provisions correspond to those contained in cls. (ii) and (iii) of s. 207 of the Act prior to the amendment. In case of a vacancy occurring by death, resignation or otherwise in the office of a liquidator so appointed, the company in general meeting may fill it subject, of course, to any arrangement that may be made with the creditors of the company. The general meeting for the purpose may be convened by any contributory or

the continuing liquidator, if any, (S. 208B identical with s. 210 of the Act before the amendment).

Provisions of ss. 208C to 208E are practically common with those applicable to a creditors' winding-up and, therefore, they will be dealt with along with the provisions applicable to a voluntary winding-up either of the members or of the creditors

#### (b) Creditors' voluntary winding-up

Ss. 209A to 209H contain provisions in relation to a creditors winding-up

Creditors of a company would be mainly concerned where the company decides to wind itself up by reason of its inability to meet its liabilities. In such a case, the company is obliged to convene a meeting of the creditors on the day, or the day next following the day, on which the meeting for passing the resolution for winding-up is to be held. It must send out the notices of such meeting to the creditors simultaneously with the notice of the company's meeting. The notice must also be advertised in the manner specified in s. 206 (1) [S. 209A (1) & (2)]

The next duty of the directors of the company is to cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the creditors' meeting to be held as aforesaid. They must also appoint one of their number to preside at that meeting who, in his turn, shall be bound to attend the meeting and preside thereat. [S. 209A (3) and (4)].

Now, assuming that the company's meeting for passing the resolution for winding up is for some reason adjourned and the resolution is passed at the adjourned meeting, any resolution passed at the creditors' meeting though prior in date to the resolution for winding-up shall be none the less valid as if it had been passed after the passing of the resolution for winding-up [S. 209A (5)]

At the same meeting, the creditors and the company may respectively nominate a person to be a liquidator for the purposes of the winding-up. If they each nominate a different person, the one nominated by the creditors shall be the liquidator unless, on an application of any director, member or creditor of the company made within seven days after the date of the nomination by the creditors, the Court orders that the person nominated by the company shall be the liquidator instead of or jointly with the one nominated by the creditors, or appoints some other person instead of the person nominated by the creditors. Where, however, the creditors do not nominate anyone, the person, if any, nominated by the company shall be the liquidator. [S. 209B].

Further the creditors may, at the same or any subsequent meeting, appoint a committee of inspection consisting of not more than five persons. In that event, the company may also, at the same or any subsequent meeting, appoint such persons as they think fit to act as members of the committee not exceeding five in number. The creditors may, however, resolve that all or any of the persons appointed by the company ought not to be members of the committee whereupon the persons mentioned in the company's resolution shall not be qualified to act as such. It is open to the Court, however, to give directions contrary to the creditors' resolution or appoint other persons in place of those mentioned in the company's resolution [S. 209].

Remuneration payable to the liquidator is to be fixed by the committee of inspection, if any, or the creditors themselves. Where it is not so fixed, it may be fixed by the Court [S. 209D (1)].

As in the case of a members' winding up, all the powers of directors cease on the appointment of the liquidator except so far as the committee of inspection, if any, or the creditors sanction the continuance thereof. [209D (2)]

Vacancy occurring by death, resignation or otherwise in the office of a liquidator other than a liquidator appointed by the Court shall likewise be filled by the creditors. (s. 209E).

#### GENERAL PROCEDURE IN VOLUNTARY WINDING UP

Sections 211 to 218 contain provisions applicable to any of the aforesaid two kinds of voluntary winding-up of a company. Section 208C is also applicable to a creditors' winding up under s. 209F with a slight modification. Section 206D is almost identical with s. 209G which, in fact, is the old s. 216 (2) slightly altered. Section 208E corresponds to s. 209H which also reproduces the provisions of the old s. 217. All these different sections will be now considered in their proper order.

Section 212 prescribes the powers and duties of a liquidator in a winding-up. It would, however, be more convenient to deal with them in the next lecture as a part of the subject of Liquidators.

It may, however, be noted that a Liquidator, howsoever appointed, may be removed by the Court on a proper cause being shown and another may be appointed in his stead. Similarly, where no liquidator is acting for some reason or the other, the Court may appoint another liquidator (S. 213). Every liquidator, however, is required to deliver to the Registrar, within 21 days after his appointment, a notice of his appointment in the prescribed form (S. 214 corresponding to the old s. 208).

The liquidator as a rule has to collect the outstandings of the company and pay off its debts. In the event, however, of the winding up continuing for more than a year, the liquidator must summon

a general meeting of the company, in the case of a member's winding up, at the end of the first year and of each succeeding year or so soon thereafter as may be convenient within 90 days of the close of the year. In the case of a creditors' winding up, he is also required to summon a meeting of the creditors at the same time. Then he must lay before these meetings an account of his acts and dealings and of the conduct of winding up during the preceding year and a statement in the prescribed form with respect to the position of the liquidation. (Ss. 208D & 209G).

When the winding up is completed, a final meeting of the company (and also of the creditors if the winding up is of the creditors) should be called by the liquidator. At such meeting or meetings, he should place an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of. These meetings have to be summoned by advertisement specifying the time, place and object thereof and published one month before the meetings in the manner specified in s. 206 (1) for publishing the resolution for a voluntary winding up.

Within a week after the final meeting, the liquidator should file with the Registrar a return of the holding of the meeting or meetings and the date or dates thereof and a copy of the account. Where, however, at any such meeting, the quorum (in case of meetings held in a creditors' winding up, two persons shall be a quorum at either meeting) is not present, the liquidator should make a return that the meeting was duly summoned and that no quorum was present thereat. Thereupon, the provisions as to the making of the return stated above shall be deemed to have been complied with.

On receiving the account and either of these returns, it becomes the duty of the Registrar to register them and, on the expiration of three months from such registration the company is deemed to be dissolved. The Court may, however, on the application of the liquidator or any other person interested in the affairs of the company, defer the date on which the dissolution is to take effect for such time as it thinks fit. And in that case, the person on whose application any such order is made should file a certified copy of the order with the Registrar within 21 days. (Ss. 208E & 209H.)

The dissolution of the company thus reached cannot be reopened except in the case of fraud or under s. 243 already referred to.

It may be noted that, if in the course of a voluntary winding up, any difficulty arises which may be best solved by the Court, s. 216 empowers the liquidator or any contributory or creditor to apply to the Court for the purpose, or to exercise all or any of the powers which it might exercise if the company were being wound up under its order. Questions between the company and third parties, however, cannot be determined under this section. **Re Centifrugal But-**

ter Co., (1913) 1 Ch. 188. And in a recent Bombay case it was held that Registrar of joint stock companies has no *locus standi* to make an application to the Court for an order for removing a liquidator appointed by a company in voluntary winding-up, and appointing another liquidator in his place. *In re Peoples' International Travel Education & Commerce Co. Ltd.*, 42 Bom. L. R. 1021.

### COMPULSORY WINDING-UP PENDING VOLUNTARY ONE

A question may be asked whether the Court can order a compulsory winding-up while the voluntary liquidation of a company is pending. S. 213 which replaces the old s. 219 with a slight but valuable alteration provides that the voluntary winding-up of a company shall not bar the right of any creditor or contributory to have it wound-up by the Court. In the case of a contributory's application, however, it requires that the Court must be satisfied that the rights of the contributories will be prejudiced by the voluntary winding-up. Prior to the amendment, even the creditor had to allege and prove prejudice to himself unless he had the support of a majority of the creditors. The amendment now removes this difficulty in his way to secure the Court's assistance in preserving his interest against any possible jeopardy, provided he could have asked in the first instance for a compulsory winding-up under s. 162. In other words, a creditor who has a right under s. 162 to have the company wound-up compulsorily can exercise that right in spite of the fact that the company has gone into voluntary liquidation. *Sri Gopal Chandra v. Narain Das*, (1938) All 945; *In re James Millward & Co. Ltd.*, (1940) Ch 333. In such a case, however, if the petition is opposed by the company and most of the creditors who wish the voluntary winding-up to continue, the Court is bound to dismiss the petition, for the new section 218 (which corresponds to s. 255 of the English Act, 1929), does not affect the old rule that the Court in such cases is bound to have regard to the wishes of the other creditors. *Home Remedies, Ltd., In re.* (1943) Ch 1. A liquidator in a voluntary winding-up, at any rate, has no right to ask the Court to pass an order for compulsory winding-up by the Court. *Sri Gopal Chandra's case (supra)*.

When such order is made, the winding-up would none the less date from the passing of the resolution for voluntary winding-up. *In the matter of Indian States Bank, Ltd.*, A. I. R. (1934) All. 114. It may also be noted that a voluntary liquidator's remuneration is liable to be reviewed by the Court where a compulsory winding-up has been ordered. *Mortimers, Ltd., In re.* (1937) 1 Ch. 289.

### ARRANGEMENT WITH CREDITORS

It has been already seen what the object of a voluntary winding-up is. Accordingly, it is easy to conceive that even a private

arrangement between a company and its creditors may be arrived at in respect to the claims of the latter.

Arrangement by a company with its creditors can be made either in view or in the course of winding-up in the following manner:—

(i) the arrangement to be binding upon the company must be sanctioned by an extraordinary resolution, and

(ii) to be binding upon the creditors, it must be acceded to by three-fourths in number and value of the creditors.

Any creditor or contributory, however, may, within 3 weeks of the completion of the arrangement, appeal to the Court against it, whereupon the Court may amend, vary or confirm the arrangement (S 215 corresponding to s 212 of the old Act) When a scheme of arrangement is made with the creditors of the company as a whole, no sanction of the Court is necessary to make it effective But such scheme should not contain powers or create bodies which are invalid in law **British-America Nickle Corp. v O'Brien**, (1927) A C 369 Again, if it is made for obviating voluntary winding-up, it is not an arrangement under the section so as to prevent a creditor who has not assented to the scheme from presenting a petition for winding up. **Contal Radio Ltd., In re**, (1932) 2 Ch 66

## AMALGAMATION AND RECONSTRUCTION

It must be remembered, however, that such arrangement is not always made merely with a view to close the company's business. A company may be taken into voluntary liquidation by a special resolution for any reason whatever. And it is under this provision that very often companies are voluntarily wound-up with a view to alter the objects, or to deal with the capital of the company in a manner which cannot be adopted by the company as originally constituted, and cannot be carried out or conveniently carried out under the provisions of the Act for the alteration of the memorandum or the reduction of the capital of a company In such cases, a company may resort to reconstruction or amalgamation

Reconstruction means the formation of a new company to take over the assets of the old one with the idea that substantially the same business shall be carried on by the same person **Hooper v Western Countries Co.**, (1892) W N 148

Amalgamation is the blending of substantially two or more undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings. **In re South African Supply**, (1904) 2 Ch 268, 287.

Now, the scheme of arrangement for any of these two purposes can be carried out *without an intervention of the Court* under ss.

208C and 209F. It must be very carefully noted in this connection that such schemes could be made even when the company is not in course of voluntary liquidation, and now, they can likewise be carried out under the new s. 153B where they involve a transfer of a controlling interest in the shareholding of a company to another company, and with the sanction of the Court under s. 153A in all other cases.

Sections 208C and 209F which reproduce the old s. 213 are very important. Section 208C provides for the power of liquidators to accept shares, etc. as a consideration for sale of the property of the company, when the winding up is at the instance of the members of the company. Where a company is sought to be reconstructed or amalgamated, a special resolution should first be passed to the effect that it is desirable to reconstruct or amalgamate the company, as the case may be and the company may accordingly be wound up voluntarily. The same resolution may also appoint liquidators with authority to them to transfer the undertaking of the old company to a new company in consideration of paid up or partly paid up shares in the new company to be distributed amongst the members of the old company or those who elect to take them. A member may, under this section, dissent from the sale of the undertaking and claim payment in cash for the value of his interest. A dissentient shareholder cannot be compelled to take shares in a new company or the value put upon his interest by the liquidator. Therefore, the dissenting member who did not vote in favour of the special resolution should express his dissent in writing addressed to the liquidator and leave it at the registered office of the company within seven days after the passing of the special resolution. By such written dissent he may require the liquidator either (1) to abstain from carrying the resolution into effect, or (2) to purchase his interest at a price to be determined by agreement or in default by arbitration. If the liquidator elects to purchase his interest, the purchase money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution.

If, within a year, an order is made for winding up by or under the supervision of the Court, the special resolution as above stated shall not be valid unless sanctioned by the Court.

Section 209F applies the above provisions of s. 208C to a creditors' winding up with the only modification that the powers of the liquidator under that section shall not be exercised except with the sanction either of the Court or of the Committee of inspection.

As stated above, where two or more companies desire to amalgamate their undertakings, it is done under these sections. In some cases, the amalgamation is effected by the registration of a new company which takes over all the undertakings of the existing com-



panies. In other cases it is effected by one of the existing companies taking over the undertaking or undertakings of the other company or companies, but to do this there must be express provision in the memorandum of association, for it is not within the ordinary scope of the company's objects to purchase the goodwill of another company. *Earnest v Nicholls* (1857) 6 H. L. C. 401, 414. On the other hand, it has been held by the Privy Council in a case from Bombay that the scheme does not depend for its validity on the constitution of the company sought to be amalgamated; it rests entirely upon statute and the only question for the Court to consider is whether the scheme is authorised by section 213. *Shamdasani v. Tata Industrial Bank*, 30 Bom. L. R. 1115.

### WINDING UP UNDER SUPERVISION OF THE COURT

The Act provides for this kind of winding up in ss 221-226. When a special or extraordinary resolution has been passed to wind up a company voluntarily the Court may order that the winding up shall proceed but subject to its supervision and on such terms and conditions as it thinks fit to impose. Two things should be noted in this connection: firstly, that an order under this section which is called a 'supervision order' pre-supposes the existence of a voluntary winding up, and secondly, that no such order will be made where the voluntary winding up has commenced under an ordinary resolution.

The jurisdiction to pass an order as aforesaid is purely discretionary, and in exercising its discretion the Court shall have regard to the wishes of the creditors and the contributories as proved to it by any sufficient evidence. It will not, as a general rule, make such order on the petition of a contributory, unless it is satisfied that the resolution for winding up was so obtained that the minority of shareholders were overborne by fraud or improper or corrupt influence. *Re Varieties, Ltd.*, (1893) 2 Ch 235, *Re Medical Battery Co.*, (1894) 1 Ch 444.

#### Effect and advantages of Supervision order

The effect of a supervision order is the same as an order for compulsory winding up except that the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers without the sanction or intervention of the Court in the same manner as if the company was being wound up altogether voluntarily. Another exception is that the power of the Court to order public examination of promoters, directors and other officers under s 196 shall not be exercised when a company is being wound up under its supervision.

Practical advantages of a supervision order are: (i) the order operates as a stay of actions and other proceedings against the company; (ii) no proceedings can be initiated or continued against the

company without the leave of the Court; and (iii) an additional liquidator may be appointed.

It may be noted here that, as in the case of a compulsory winding up, the company in the present case can be dissolved only by an order of the Court.

## LECTURE XV

### CONSEQUENCES OF WINDING UP

*Consequences as to Shareholders—Consequences as to Creditors—Consequences as to Dispositions by the company—Consequences as to Servants—Consequences as to Officers—Consequences as to Proceedings against the Company—Consequences as to Costs—Consequences as to Documents—Dissolution—Liquidators (1) in a Winding Up by the Court (2) in a Voluntary Winding Up, (3) in a Winding Up under Supervision—Liquidator's Power of Disclaimer—Liquidator's Duty as to Pending Winding up—Liquidator's Duty as to Payment into Bank—Winding Up of Unregistered Companies—Defunct Companies*

#### CONSEQUENCES AS TO SHAREHOLDERS

It has already been stated that a shareholder of a company is liable and bound to pay full amount on the shares held by him. His liability in this behalf continues even after the company is taken into liquidation. But for the purposes of the winding up proceedings, he is described by the Act as a contributory and certain changes are occasioned in his status, rights and liabilities, on the company going into liquidation, as a result of some imperative provisions of the Act.

##### Contributories

The term 'contributory' is defined by s. 158 of the Act. It means every person liable to contribute to the assets of a company in the event of its being wound up, and in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories includes any person alleged to be a contributory. The section, however, does not state who are the persons liable to contribute to the assets of the company on its being wound up. One must look to s. 156 for that, which says that persons liable to contribute are every present and past member of such company subject to the qualifications mentioned in the section. The qualifications so mentioned deal with the circumstances in which such persons are liable to contribute and also the extent of their liability.

The list of contributories consists of two parts, A and B. A contributory is the present member of the company, i.e., those who are members at the commencement of the winding up. B contributories are the past members of the company, i.e., those who have ceased to be members within a year preceding the winding up. A person who has legally been a member and has ceased to be such is a past member. In the term 'past member' are, therefore, included persons whose shares have been forfeited, surrendered, cancelled, or transferred within the year preceding the winding up, but not a person who has died within that year. *Off. Liqr. v. Jamna Prasad*, 31 All. 417. All such persons are liable to be placed on the B list.

### Nature of contributories' liability

S. 159 as amended defines the liability of a contributory. It says that the liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator. In other words, the liability of a contributory, though commencing at the date when he entered into the contract with the company under which he became a member, is only contingent during the winding up inasmuch as, until a call is made, it is nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding up. The liability of a contributory, however, creates a debt under the section and it does not become payable until a call is made. The effect of this provision is to give to the liquidator a new cause of action which a company itself might not have. For instance, if the claim of a company for the realization of any call from a member is barred by limitation, such member becomes liable to pay all that has remained unpaid on his shares including the unpaid call when the company goes into liquidation. *In re Whitehouse*, 9 Ch. D. 595; *Jagannath Prasad v. U. P. Flour Mills Co. Ltd.*, 38 All 347; *Prayan Prasad v. Gaya Bank Asso. Ltd.*, 10 Pat. 249; *Pokhar v. Flour Mills Co., Ltd.*, A. I. R., (1934) Lah. 1015; *In re East Bengal Sugar Mills, Ltd.*, (1940) 2 Cal. 175. And it is no answer to this statutory liability that there had been an arrangement between a member and the directors to exclude such liability. *Geoffrey v. Sikdar Iron Works, Ltd.*, 59 Cal. 1099. Further, no time runs against the liquidator until he makes a call on the contributories, because under the foregoing provision the liability of a contributory to pay on his shares creates a new debt which becomes payable only when a call is made on him. Let it be observed in this connection that with regard to other claims of the company, whether against the contributories or outsiders, there is no revival of the cause of action on the winding up of a company, and the time continues to run even after a liquidator is appointed. *Hansraj Gupta v. Off. Liqr. of the Dehra Dun Mus-*

**soorie Tramway Co.**, 35 Bom. L. R. 319 (P. C.). If, therefore, a claim of a company is barred before liquidation, the liquidator cannot recover the same. **Upper India Rice Mills v. Jaunpur Sugar Factory Ltd.**, 25 All. L. J. 277. The extent of the liability of the estate of a deceased member is the same as if the deceased had been living at the time of the winding up. The heirs and legal representatives of a deceased member are liable to contribute to the assets of the company in discharge of his liability. In default, proceedings may be taken for administering the property of the deceased contributory and compelling payment thereof of the money due. The surviving coparceners of a contributory who was a member of a joint Hindu family governed by Mitakshara are for this purpose deemed to be his legal representatives and heirs. (S. 160). S. 161 lays down that if a contributory becomes insolvent after the winding up has commenced, he becomes a stranger to the company and that, although his name remains on the list of contributories, his assignee in insolvency represents him for all purposes and is to be deemed a contributory.

#### Extent of liability

Now a member on the A list is liable to the extent to which his shares are not fully paid up. But the liability of a member on the B list arises only if (1) it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them, and (2) the debts incurred by the company while he was a member remain unpaid after applying all the contributions of the A contributories and all the assets of the company *pari passu* towards payment of all its debts irrespective of the date when they were incurred. Even if this second condition were present, a past member would have to pay nothing if the transferee of his shares had paid for them in full. In other words, a past member is liable to be called upon to pay only so much of the amount, if any, on the shares that may have remained unpaid by his transferee as a present member as is necessary to pay the debts or any part thereof incurred while he was a member.

#### Claim to set-off

At any rate, a fully paid shareholder cannot be put on the list of contributories merely to give the Court the power to order him to pay his other debt to the company. In *re G. E. B.* (a debtor), (1903) 2 K. B. 340. He may be, however, put on the list with his consent because though he is not liable for calls, he is entitled to share in the surplus assets of the company. *Re Anglesea Colliery Co.*, 1 Ch. 555.

It may be that as against the liability of a contributory under the above provisions, there may be some amount due to him from

the company in his character as a member in the form of dividends, profits or otherwise. S. 156 (1) (vii) provides that in such a case the sum due to such contributory shall not be regarded as the debt due from the company where the claim of any outside creditor of the company is outstanding. It means that the contributory in that case has to make his contribution to the assets of the company without any right to claim a set-off in respect of the amount due to him from the company by way of dividend, profits or otherwise. In any case, such sum will be taken into account for the purpose of the final adjustment of the rights of the contributories *inter se*.

As regards moneys due from a contributory of the company on any other account, the Court may order him to pay them in the manner directed by it, and no set-off in respect of any amount that may be due to him from the company on any independent dealing or contract can be allowed to him except in the case of an unlimited company, or unless such contributory is a director of a limited company with unlimited liability **Chandiok v Pearey Lal**, A. I R (1942) All 136 The set-off in respect of any such moneys or any other amount due to him in respect of any dividends may, however, be allowed in any case against any subsequent call if, without the aid of any contributions from the contributories, all the creditors of the company are paid off out of the assets of the company. (S. 186). It will be observed that the provisions of sub-section (1) of s. 186 invest the Court with a discretion whether to grant or refuse to grant an order against a contributory in respect of a claim other than a call. Where, therefore, the Court refuses to grant such order, the liquidator must proceed by way of a civil suit to enforce the claim, and it would be open to the contributory to plead the ordinary legal defences including a right to set-off to such a claim. There is nothing in s. 186 which can reasonably be construed as a general deprivation of contributories of the right of set-off. **Shri Nath Sah v. Off. Liqr. Benares Bank, Ltd.**, (1941) All. 153 (F. B.).

### Director-Contributory

One more provision may be noted here as regards a contributory who is also the director of a company. S. 157 of the Act describes the liability of a director on winding up of a limited company. It says that a director, present or past, whose liability is unlimited (p 129) is liable to contribute to the assets of the company to an unlimited extent over and above his liability (if any) to contribute as an ordinary member in the event of the company going into liquidation. But there are limitations to this liability. A past director is not liable if he has ceased to be a director for a year or upwards before the winding up. Secondly, a past director shall not be liable in respect of any debt or liability of the company contracted after

he ceased to hold office. And thirdly, subject to the articles of the company, a director, present or past, shall not be liable to make any contribution unless the Court deems it necessary in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up. It will be observed that even a present or past director will not ordinarily be called upon to make any contribution in pursuance of his unlimited liability until it is found that all the present and past members of the company are not in a position to satisfy the debts of the company. In fact, he may be called upon to contribute practically after all the resources of the company are exhausted and yet the debts of the company are not completely discharged.

### Enforcement of liability

Now, the liability to contribute, of both past and present members, is enforced by means of calls. When the winding-up is by the Court, the liquidator makes calls with the sanction or under an order of the Court. On a voluntary winding-up, the liquidator can make calls without the sanction of the Court. As soon as the call is made, the debt created by the liability of the contributory on winding up becomes payable.

### Restriction of transfer of shares, etc.

In addition to the liability imposed by the foregoing provisions on the members of a company in the event of its being wound up, s. 227 of the Act imposes a sort of restriction on them, viz., that in the case of a voluntary winding up, no transfer of shares except transfers made to or with the sanction of the liquidator shall be made and that every alteration in the status of the members of the company after the commencement of such winding-up shall be void. In the case of a winding-up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding up shall be void unless the Court otherwise directs. The principle on which the provisions with regard to disposition of company's property is based is that in all winding up (as well as bankruptcy) all unsecured creditors should be paid *pari passu* and the Court will not tolerate any conduct on the part of the company or its directors which has the effect of giving preference to one creditor or a set of creditors over the other creditors of the company.

It may be noted here that though shares cannot be transferred except with the sanction of the liquidator or the Court, as the case may be, debentures may be transferred without any objection whatever.

## CONSEQUENCES AS TO CREDITORS

It has been stated in the preceding lecture that a company can never be declared bankrupt. But, all the same, distinction is to be made, as regards the rights of the creditors of a company which is being wound up, as between the winding up occasioned by reason of the company being unable to pay its debts and the one occasioned by any other reason while the company is perfectly solvent. In the former case, the company is to be deemed insolvent, and the same rules prevail as to (1) the respective rights of secured and unsecured creditors, (2) debts provable, and (3) the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to estates of persons adjudged insolvent (s. 229). While in the latter case, namely, where a solvent company is being wound up, all debts payable on a contingency and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, as far as possible, of the value of such debts or claims as may be subject to any contingency, or for some other reasons do not bear a certain value (s. 228). It may be noted here that liquidators are not bound by decrees which the creditors may have obtained against the company, and they are entitled to go behind such of them as they consider were not properly obtained. **Off. Liqs. Gorakhpur Electric Supply Co. v. Siemens (India) Ltd., (1940) All. 730.**

### Proof of Debts

Now, debts or claims are to be proved within the time to be fixed by the Court (s. 191). A creditor who does not prove does not lose his right altogether. He can prove so long as there are any assets undistributed. He cannot, however, disturb any former dividend.

No difficulties would arise where a solvent company is being wound up. The creditors have merely to prove their claims, and that being done, they are paid off out of the assets of the company.

In the case of an insolvent company, however, one must analyse and examine the provisions of s. 229 stated above. The expression 'rules' in the section is interpreted to import the provisions contained in any section of the Insolvency Acts and rules made thereunder unless there is already a provision in the Companies Act providing for the matter. **Hansraj v. Off. Liqr., 51 All. 695.** On this principle, it seems to have been held in a case by the Bombay High Court that s. 49 of the Presidency Towns Insolvency Act can apply to give any Crown debt as distinguished from those mentioned in s. 230 (1) (a) a first priority. **Motor Emporium Co. v. Moos, 29 Bom. L. R. 1446.** It is submitted that, even under the decision of the Allahabad High

Court in *Hansraj's case*, as s. 230 of the Companies Act exhaustively provides the kinds of debts which are entitled to priority in a winding up, s. 49 of the Presidency Towns Insolvency Act cannot be made applicable under s. 229 so as to enlarge the provisions of s. 230 and give priority to any Crown debts other than those mentioned in that section. This view has been expressed by the Calcutta and Lahore High Courts and it has been held that a trade debt due to the Crown is not entitled to priority in the winding up of a company. *Northern Bengal Co. Ltd., In re.*, (1937) 1 Cal. 684; *Secretary of State v. Punjab Industrial Bank, Ltd.*, 12 Lah. 678. And now, it has been held by the Privy Council in a recent case that the Crown is bound by the provisions of the Act and is, accordingly, not entitled to any prerogative, priority or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by Ss. 230 and 232(2). *Governor-General v. Shiromani Sugar Mills*, 48 Bom. L. R. 482 ((P. C.)).

In liquidation proceedings of an insolvent company, a secured creditor under this section may do one of three things: (1) he may rely on the security and ignore the liquidation altogether; (2) he may value his security and prove for the balance of his debt; or (3) he may give up his security and prove for the whole amount. A secured creditor, however, who realizes his security cannot prove for interest due after winding up, when claiming the balance of the amount. He can prove for the balance and interest upto winding up only. *Quartermane's case*, (1892) 1 Ch. 539. An attaching creditor whose attachment does not mature by sale thereunder is not a secured creditor only by reason of his attachment. *Goverdhandas v. Official Liquidator*, 31 Bom. L. R. 1209.

Unsecured creditors of an insolvent company are paid in the following order:—

- (1) preferential payments under s. 230 (*infra*);
- (2) other debts *pari passu*.

But debts in respect of which a rate of interest is paid varying with the profits of the company are postponed until other debts are paid in full.

A creditor can prove for interest on his debt up to the date of the winding up in the case of an insolvent company wound up either voluntarily or compulsorily. If the company is solvent, i.e., if there is a surplus after paying the capital and interest on all debts upto the commencement of the winding up, interest is payable from that date upto the date of payment, but no interest would be paid to the creditors whose debts do not carry interest even when the company is found to be solvent. *Off. Receiver, High Court, Madras v. Rao & Co.*, A.I.R. (1948) Mad. 64.



All claims can be proved in winding up except claims which are, by an order of the Court, declared to be incapable of being fairly estimated. *Hardy v. Fothergill*, 13 A. C. 351.

### Preferential payments

Where the assets of the company available for payment of general creditors are insufficient to meet them, certain unsecured debts are paid even before the debenture-holders under any floating charge and before payment of any other debt of the company. These preferential payments have been already mentioned in the lecture on debentures. They are. (1) rates and taxes having become due and payable to the Crown (*supra*) or to a local authority within the twelve months next before the commencement of the winding up; (2) wages of a clerk or servant for the two months before the winding up not exceeding Rs. 1,000 for each clerk or servant; (3) wages of a workman for two months before the winding up not exceeding Rs. 500 for each; (4) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company; (5) all sums due to any employee from a provident, pension, gratuity or any other fund maintained by the company; and (6) the expenses of any investigation held under s. 138 (iv). These debts shall rank equally among themselves and be paid in full, unless the assets are insufficient in which case they shall abate in equal proportions. It may be noted here that these preferential payments have priority also over a landlord's right of distress, if exercised within three months before the date of the winding up order and they are a first charge on the goods so distrained or the proceeds of sale. But in this last case, if any money is paid to any person having a right to a preferential payment as aforesaid, the landlord shall have the same right of priority as the person to whom the payment is made (S. 230).

### CONSEQUENCES AS TO DISPOSITIONS BY THE COMPANY

#### Fraudulent preference

As regards the dispositions of the properties of a company, the bankruptcy rule as to fraudulent preference applies when an insolvent company is being wound up. S 231 of the Act provides for this and states that any transfer, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference. (See s. 56 of the Presidency Towns Insolvency Act). In order to prove a fraudulent preference under this section, it must be shown that (1) the transaction took place within 3 months of the presentation of

the petition in case of a winding up (either originally or pending a voluntary winding up) by or subject to the supervision of the Court and of the resolution in the case of a voluntary winding up [**Chennakesava v. Official Liquidator**, A. I. R. (1943) Mad. 54]; and (2) that the dominant motive in the mind of the company, acting by its directors, was to prefer one creditor to the others. In **re Jackson and Bassford**, (1906) 2 Ch. 467. The test is whether the proper inference to draw from the facts is that the dominant motive actuating the debtor is that, in making the transfer, the debtor is doing what he himself felt bound or compelled to do. If so, the case is not of a fraudulent preference. **Nabin Kishori v. Jagneshwar**, A. I. R. (1933) Cal. 809, In **re M. I. G. Trust Ltd.**, (1933), Ch. 542. But in a case where out of a number of creditors two at least were left unheeded while the rest were satisfied by the assignment of pro-notes or other valuable securities, it would be proper to find that there was on the part of the company an intent to prefer within the meaning of s 231. **Chennakesava's case** (*supra*). Further, under clause (3) of this section, any transfer or assignment by a company of all its properties to trustees for the benefit of all its creditors shall be void. This includes a floating charge over all the assets of the company for the benefit of all its creditors. **London Joint City Bank v. Herbert Dickinson, Ltd.**, (1922) W N 13. Where, however, loans are advanced in pursuance of an agreement to issue debentures, but the debentures are issued within 3 months of the winding up of the company, the debentures will not be held invalid on the ground of fraudulent preference. In **re Stanton, Ltd.** (1929) 1 Ch 180.

#### Floating charge when invalid

Every floating charge is not valid for the purposes of the winding up. S. 233 says that a floating charge on the property or undertaking of a company, created within three months of the commencement of the winding up, shall unless it is proved that the company immediately after creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge together with interest thereon at the rate of 5 percent per annum. This section, however, does not touch the question of a fraudulent transfer of debentures. It must be remembered that every floating charge crystallizes and becomes a fixed charge on the winding up of the company.

#### CONSEQUENCES AS TO SERVANTS

A winding up order by a Court operates as a dismissal or discharge of the servants of the company. **Chapman's case**, 1 Eq. 346; s. 172 (3). And such discharge relieves the servant from all obliga-

tions under his contract of service. Thus, where A agreed to act as a director of the company for seven years and not to engage in any competing business for seven years after he should cease to hold office, and the company was ordered to be wound up, it was held that the winding up order operated as a wrongful dismissal of A, and that he was free from his agreement not to compete with the company. *Measures Bros. Ltd. v. Measures*, (1910) 2 Ch. 248.

A voluntary winding up also in most cases operates as a discharge of the company's servants. In *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357, it was held that the resolution for winding up did not operate as a discharge of the servants. The ground of this decision was that the corporate existence and corporate powers of the company subsisted, notwithstanding the winding up; and that as the liquidator was appointed by and was an officer of the company there was no change in the personality of the employer as to dismiss the servants. But in a later case *Reigate v. Union Manufacturing Co.*, (1918) 1 K. B. 592, the Court of Appeal considered the question and Scrutton, L. J., after referring to the headnote to the *Midland Bank's* case observed :

"If that means that a resolution for voluntary winding up is never to discharge the servants of the company, I cannot agree with it. It seems to me that it may or may not be a discharge of the servants according to the facts of the particular case."

This decision virtually overrules the former. Where an appointment is for a fixed period, it becomes a question of construction whether there is a definite agreement by the company to provide employment for the period named, in which case no term will be implied authorising the company to discontinue its business by a resolution for voluntary winding up during that period. Where there is no such definite agreement, the resolution for winding up would operate as a discharge of the employee. *Fowler v. Commercial Timber Co.*, (1930), 2 K. B. 1; *Railway & Electric Co., In re*, 38 Ch. D. 597.

### CONSEQUENCES AS TO OFFICERS

The expression 'officer of the company' may include the secretary, solicitor, or auditors of the company, but it does not include a share-broker. *G. Tiruvengadachariar v. Velu Mundaliar*, (1938) Mad. 192.

It has been stated in the preceding lecture that, on the winding up of a company, the powers of the directors usually cease.

It has been further stated that the Court may call any officer of the company or any person indebted to the company, or who has property of the company in his possession, or who can give any information as to the company and order him to bring with him any books and documents relating to the company.

A reference has also been made to the power of the Court to order public examination of any person who has taken part in the promotion of the company, or has been a director or officer of the company, on a report by the official liquidator that fraud has been committed. There need only be a *prima facie* case of suspicion on the part of such liquidator. *Re Bank of Hindustan*, 13 Eq. 178.

### Misfeasance claims of the company

Then again, the officers may be liable for misfeasance under s. 235 of the Act. If any promoter, director, liquidator or officer of the company has misapplied or retained money or property of the company or has been guilty of misfeasance or breach of trust, the Court may, on the application of the liquidator, or of any creditor or contributory, examine into his conduct and order him to repay or restore money or property or to pay compensation. Proceedings under this section, however, can be brought against the officer concerned during his lifetime and within the period of limitation prescribed by the section. The right to bring or continue such proceedings does not survive his death, and no question of the application of the maxim '*actio personalis moritur cum persona*' arises in relation thereto. *Offi. Liqs. Mufasil Bank v. Jugal Kishore*, (1939) Mad. 6; *Manilal v. Vandravandas*, A. I. R. (1944) Bom. 193; *Sankaram v. Kottayam Bank*, A. I. R. (1946) Mad. 304. Prior to the Amendment Act, 1936, the Indian Limitation Act applied to an application under this section as if such application were a suit. This provision, however, led to a divergence of views among the High Courts as to the precise article of the Limitation Act which applied to such application. The Bombay High Court held that it was governed by art. 120 of the Limitation Act and not by article 36, 115 or 116. *Govind v. Raghunath*, 32 Bom. L. R. 232. The Madras and Allahabad High Courts also held the same view. *Rama Seshayya v. Shree Tripurasundari Cotton Press, Bezwada*, 42 Mad. 468; *In the matter of the Union Bank of Allahabad, Ltd.*, 47 All. 669. But the Lahore High Court dissented from that view. *Bhimsingh v. Liquidator, Union Bank of India*, 8 Lah. 167. The conflict is now set at rest by the Amendment Act, 1936, which amends s. 235 and provides that the application should be made within 3 years from the date of the first appointment of a liquidator, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

### Criminal liability and prosecution

The next section provides punishment for falsification, destruction, mutilation, alteration or fraudulent secretion of any of the books, papers or securities of the company which is being wound up.

The gist of the offence is the intention to defraud or deceive any person.

S. 237 is replaced by an entirely new section, sub-sec. (6) whereof is again split up into two sub-sections with sub-sec. (7) renumbered as sub-sec. (8) by the amending Act II of 1938, and it provides the procedure for the prosecution of delinquent directors, managers and other officers.

If, in the course of a winding up by, or subject to the supervision of, the Court, it appears to the Court that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company, it may either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the Registrar. In the latter case, if the Registrar considers it to be a fit case for prosecution, he shall place the papers before the Advocate-General or the public prosecutor and if so advised institute proceedings for the purpose. No prosecution shall, however, be undertaken unless an opportunity is given to the accused person to make a statement in writing to the Registrar and of being heard thereon.

Similarly, if in the course of a voluntary winding up, it appears to the liquidator that any such person as stated above has been guilty of a criminal offence in relation to the company, he shall forthwith report the matter to the Registrar. The Registrar may in this case do either of the three things, viz., (i) he may proceed as when the matter is referred to him by the Court, (ii) he may refer the matter to the Central Government for further inquiry whereupon they shall investigate the matter and, if thought expedient, may apply to the Court for an order conferring on any person designated by them all such powers of investigating the affairs of the company as are provided by the Act in the case of a compulsory winding up; or (iii) if he is of opinion that the case is not a fit one for prosecution, he shall inform the liquidator accordingly. The liquidator in such a case, if he holds a different opinion, may himself take proceedings against the offender after securing a sanction of the Court. In case, however, the liquidator does not make a report to the registrar as he should, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such report which, on being made, shall be dealt with by the Registrar in any one of the three ways mentioned above.

In connection with every prosecution in pursuance of these provisions, it shall be the duty of the liquidator and of every officer and agent of the company, past and present (other than the defend-

ant in the proceedings), to give to the Registrar all assistance he is reasonably able to give. 'Agent' here includes any banker, legal adviser or auditor of the company. In case of default, the Court may, on the application of the Registrar, direct performance of that duty. Where the liquidator is in default, the Court may order him to pay the costs of the application personally unless it appears that the default was due to the liquidator not having in his hands sufficient assets of the company.

S. 238 provides penalty for false evidence. If any person upon any examination upon oath authorised under the Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment as well as fine.

In addition to the aforesaid penal provisions the Amendment Act, 1936, has introduced another omnibus section 238A which reproduces s. 271 of the English Act, 1929. It provides penalties of imprisonment for a number of offences committed by officers of companies in liquidation either antecedent to or in the course of winding up.

Considering the extensive penal provisions now to be found in the Act in respect of almost every requirement of the Act, Palmer rightly says that there are very few requirements of the Act which are not fortified with penalties in case of default. Fines are in many cases imposed on the company and upon 'any officer who is in default,' and in some cases, imprisonment is mentioned.

### CONSEQUENCES AS TO PROCEEDINGS AGAINST THE COMPANY

It has been stated that after the winding up petition is presented, the Court may stay all proceedings against the company. After the winding up order is made, all proceedings against the company must cease even without any stay order by the Court, unless the Court gives special leave for them to continue. An appeal filed against a company after the passing of a winding-up order, without leave of the Court, is no valid appeal; and a subsequent application for leave 'to continue the appeal' is in reality only an application for leave to commence or launch an appeal; and if such application is made at a time when the appeal is time-barred, the application will necessarily be rejected by the Court. **Maharaj Kishore Khanna v. Benares Bank Ltd.** (1941) All. 565. Similarly, where a suit is filed against a company after it has been ordered to be wound up, without the leave of the Court, the Court has no jurisdiction to grant leave to the plaintiff to continue his suit. In such a case, the Court has inherent jurisdiction to dismiss the suit on an interlocutory

application. *Har Narain Misra v. Kanahiya Lal*, (1939) 2 Cal. 425. Further, any distress or execution put in force against the assets of the company after the commencement of the winding up is void. (S. 232). These rules also apply to a winding up under supervision. But on a voluntary winding up, the Court may restrain proceedings against the company if it thinks fit. *In re Margot Bywaters, Limited*, (1942) Ch. 121.

### CONSEQUENCES AS TO COSTS

Lastly, the costs ordered to be paid by the company while in liquidation of any action brought or defended by it have to be paid first out of the assets of the company. Similarly, all costs, charges, and expenses properly incurred in the winding up are payable out of the assets of the company in priority to all other claims except those of the secured creditors, if any (S. 217)

### CONSEQUENCES AS TO DOCUMENTS

Firstly, where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, *prima facie* be evidence of the truth of all matters recorded therein (S. 240).

Secondly, after an order for winding up by, or subject to the supervision of, the Court is made, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any document in the possession of the company may accordingly be inspected by creditors or contributories (S. 241).

Lastly, when a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of, in the case of winding up by, or subject to the supervision of, the Court, in such a way as the Court directs, and in the case of a voluntary winding up, in such a way as the company by extraordinary resolution directs. Irrespective of whether they are thus disposed or not, no liability shall rest on the company, or the liquidators or any person to whom the custody of the documents has been committed after three years from the dissolution of the company by reason of the same not being produced to any person claiming to be interested therein. (S. 242).

### DISSOLUTION

Winding up of a company ultimately results in its dissolution whereupon its corporate existence comes to an end. When the affairs of a company have been completely wound up as a result of the Court's order for winding up, the Court makes an order that the company be dissolved from the date of the order, and the company

is accordingly dissolved. The order is then reported within 15 days by the official liquidator to the Registrar who makes a minute of the dissolution of the company in his books. In case of default, the liquidator is liable to be fined to the extent of Rs. 50 per day. (S. 194). If on such dissolution, any assets of the company remain undistributed, they pass to the crown as *bona vacantia*. If any assets are found or recovered after the dissolution, motion is usually made to set aside the dissolution under s. 243 by the liquidator or any other person interested within two years from the date of the dissolution.

Where, however, a company is being wound up voluntarily, it is dissolved quite in a different manner without any order of the Court. The procedure for the purpose is now laid down in ss. 208E and 209H according as the winding up is of the members or of the creditors. Within a week after final meeting or meetings, as the case may be, the liquidator is required to send a copy of his final account and a return of the holding of the meeting or meetings to the Registrar. The Registrar forthwith registers them in his books and on the expiration of 3 months from such registration, the company is deemed to be dissolved. The Court, in such a case, has only the power to defer the date of dissolution on the application of the liquidator or any other person interested. S. 243, however, applies to a dissolution even under these provisions.

A company which is being wound up subject to the supervision of the Court can be dissolved only in the manner provided in s. 194 referred to above.

## LIQUIDATORS

It now remains to consider the question of liquidators, how they are appointed and removed and their powers and duties as laid down by the Act. It will be remembered that, in every winding up, a liquidator must be appointed. But it must be noted that the mode of appointing him depends upon the mode in which the company is wound up. It would therefore be convenient to deal separately with liquidators as appointed under each of the three different modes of winding up which have been already noticed.

### (I) IN A WINDING UP BY THE COURT

S. 175 of the Act deals with the appointment of a person as an official liquidator when a company is ordered to be wound up by the Court. Such appointment is made as soon as the winding up order is made. Where it is not so made, the new s. 171A provides that the official receiver attached to the Court shall automatically become the official liquidator of the company and forthwith take into his custody and control all the books, documents and assets of the com-



pany. He shall continue to act as such until his discontinuance by the Court. The Court may also after giving notice to the company, unless dispensed with for reasons recorded, appoint a provisional liquidator after the presentation of a petition for winding up, and before the winding up order is made.

Now, the Court may appoint one or more persons as official liquidators, and in that event, declare whether any act required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons. It may also determine if any and what security is to be given by any official liquidator on his appointment. The section further lays down a very important rule that the act of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment provided that nothing in the section shall be deemed to validate any acts done by him after his appointment is shown to be invalid. Furthermore, the Court will not appoint a receiver of the assets in the hands of an official liquidator.

The next section provides that an official liquidator may resign, or be removed by the Court on a proper cause being shown, (e.g., incapacity, etc.) and the vacancy may be filled up by the Court. Until the vacancy is so filled up, the official receiver shall be and act as the official liquidator. The Court may also determine the remuneration of the liquidator, by percentage or otherwise, and also fix the proportion for distribution of such remuneration among the liquidators where they are more than one.

S. 177 says that the liquidator so appointed shall not be described by his individual name but as the official liquidator of a particular company, and s. 178 empowers him to take into his custody all the property, effects and actionable claims of the company which are to be deemed to be in the custody of the Court as from the date of the winding up order. It must be carefully noted in this connection that the property of the company does not vest in the liquidator. He is a trustee for all persons who were creditors of the company at the date of the winding up. He in fact represents both the company and the creditors.

### Statement to the Liquidator

To facilitate the work of the liquidator, the Amendment Act, 1936, by the new s. 177A requires a statement to be submitted to him as to the affairs of the company unless the Court otherwise orders. Where a provisional liquidator is appointed, such statement should be submitted to him.

The statement must contain the following particulars:

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities;

(c) the names, addresses and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of the former, particulars of the securities, their value and the dates when they were given;

(d) the debts due to the company, the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

The statement when made out must be verified by an affidavit by one or more of the directors and the secretary, manager or other chief officer of the company. The official liquidator may, however, subject to the direction of the Court, require it to be verified either by the persons (i) who are or have been the directors of the company, or (ii) who have taken part in the formation of the company within one year before the date of the order or the appointment of the provisional liquidator, or (iii) who are or have been in the employment of the company within the same period, or (iv) who are or have been within that period officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

The statement must be submitted within 21 days from the date of the order of winding up or of the appointment of the provisional liquidator, as the case may be. The time may, however, be extended by the liquidator or the Court for special reasons. Costs and expenses incurred in this behalf shall be payable out of the assets of the company subject to an appeal to the Court.

The statement so submitted shall be open to inspection by any person stating himself in writing to be a creditor or contributory of the company at all reasonable times on payment of the prescribed fee. A copy or extract therefrom can also be had if the person so desires.

Default in complying with the requirements of the section is made punishable with fine to the extent of Rs. 100 per day. Similarly, any person untruthfully stating himself to be a creditor or contributory of the company would be guilty of an offence under s. 182 of the Indian Penal Code, and on the application of the liquidator or of the official receiver, be punishable accordingly.

#### Statement by the Liquidator

After the receipt of the statement under the foregoing provisions, or where the Court orders that no such statement shall be submitted, the official liquidator is required by another new s. 177B to submit a preliminary report to the Court not later than four, or with the leave of the Court, six months from the date of the winding up order. The report must be as regards (i) the amount of

capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of cash and negotiable securities, debts due from contributories, debts due and securities, if any, available to the company, movable and immovable properties of the company and unpaid calls; (ii) if the company has failed, as to the cause of the failure; and (iii) whether any inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of its business. The liquidator may, if he so likes, make a further report or reports as to any other matters, such as the fraud committed by any officer of the company in or since its formation, which, in his opinion, should be brought to the notice of the Court.

### Committee of Inspection

The Amendment Act, 1936, further introduces s. 178A based on s. 199 of the English Act, 1929, for the appointment of a committee of inspection to help the liquidator in the winding-up. For this purpose a duty is imposed upon the liquidator to convene a meeting of the creditors of the company within a month from the date of the winding up order in order to ascertain whether or not such committee should be appointed to act with the liquidator and also who are to be the members of such committee, if appointed. Within a week thereafter, the liquidator is further required to convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications. If the contributories do not accept such decision in its entirety, the liquidator should apply to the Court for directions as to whether there should be a committee of inspection and, if so, what should be the composition of the committee and who shall be the members thereof. At any rate, the committee, howsoever appointed, must not consist of more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

The committee is empowered by the section to inspect the accounts of the liquidator at all reasonable times. They must meet at least once a month and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary. They may act by a majority of their members present at the meeting but cannot act unless a majority of the committee are present.

A member of such committee may resign by notice in writing signed by him and delivered to the liquidator. If, however, a member becomes bankrupt, or compounds or arranges with his creditors

or remains absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or the contributories, as the case may be, his office would thereupon become vacant.

Besides, a member of the committee may be removed by an ordinary resolution of the creditors or contributories, whom he represents. Seven days' notice stating the object of the meeting must, however, be given in such a case.

Any vacancy occurring on the committee is to be filled by a resolution passed at a meeting of the creditors or of the contributories, as the case may be, which must forthwith be summoned by the liquidator. The continuing members of the committee, if not less than two, may continue to act in the meantime.

### **Powers of an Official Liquidator**

These are described in s. 179 of the Act and can be had only with the sanction of the Court. But the Court under the next section may at any time make an order providing that the official liquidator may exercise any of these powers without its sanction or intervention, and where a provisional liquidator is appointed, may limit and restrict his powers by the order appointing him.

Now, the powers conferred by the section are. —

- (1) to bring and defend actions in the name of the company;
- (2) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
- (3) to sell and transfer the property of the company by public auction or a private contract;
- (4) to execute and seal documents and deeds on behalf of the company,
- (5) to prove, rank and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in respect thereof;
- (6) to draw, accept, make and endorse any bills of exchange, hundis or promissory notes with the same effect as if drawn, etc., by the company in the course of its business;
- (7) to raise money on the security of the assets;
- (8) to take out in his own name letters of administration to any deceased contributory;
- (9) to do all other things as may be necessary for winding up the affairs of the company and distributing the assets; and
- (10) to appoint an advocate or pleader entitled to appear before the Court in order to assist him in the performance of his duties, provided that where the official liquidator is an attorney, he shall not appoint his partner unless the latter consents to act without remuneration. (S. 181).

In connection with the aforesaid powers, reference may well be made to what Jessel, M. R. observed in *In re Wreck Recovery and Salvage Company*, 15 Ch. D. 353 at p. 360 in regard to the liquidators' power to carry on the business of the company so far as may be necessary for the beneficial winding up of the company:

"Now, the word 'necessary' means that it must not be merely beneficial but something more, though the necessity must be determined by the Court, having regard to all the circumstances of the case. It does not, of course, mean that no other course would be possible. Then it must be for the 'beneficial winding up' of the business of the company; therefore, it must be with a view to the winding-up of the company, not with a view to its continuance."

It may be noted here that no liquidator, official or otherwise, as representative of a company in liquidation, has a right of audience in any proceeding in a suit brought by such company in the ordinary original jurisdiction of a High Court. *Eastern Tavoy Minerals Corpn. Ltd. v. Clarke, Rawlins, Ker & Co.*, (1937) 2 Cal. 173.

#### Duties of an Official Liquidator

The duties of an official liquidator besides those already mentioned are prescribed by ss. 182 and 183 of the Act. Under the former, as amended by the Amendment Act, 1936, he is required to keep proper books in which entries or minutes of proceedings at meetings and of such other matters as may be prescribed are to be made. And any creditor or contributory may, subject to the control of the Court, personally or by his agent, inspect such books. The liquidator is further required twice a year to present to the Court an account in duplicate of his receipts and payments as such liquidator in the prescribed form and verified by a declaration in the prescribed form. The Court in its turn is required to cause that account to be audited in any manner it thinks fit, and after the audit, one copy should be kept by the Court and the other copy should be delivered to the Registrar for filing. Each of these copies would be open to inspection by the creditors or any other interested person. The next section provides that the official liquidator shall have regard to any directions that may be given by resolution of the creditors and the contributories at any general meeting or by the committee of inspection in regard to the administration and distribution of assets among the creditors. Secondly, he may in his discretion summon general meetings of the creditors and contributories in order to ascertain their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories may by resolution direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

Besides having to pay regard to the directions of the creditors and the contributories as aforesaid, an official liquidator is entitled

to use his own discretion in the administration and distribution of the assets among the creditors. He may also apply to the Court for directions in relation to any matter arising in the winding-up.

If any person is aggrieved by any act or decision of the official liquidator, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision and make such order as it may think just in the circumstances.

## (2) IN A VOLUNTARY WINDING-UP

A voluntary winding-up of a company may now be either a members' winding-up or a creditors' winding-up. The mode of appointing liquidators in each case has been already treated in the preceding lecture and, therefore, need not be repeated here.

### Powers and duties of Liquidators

The liquidator in a voluntary winding-up is not really a trustee for the creditors or the contributories nor is he an officer of the Court. He occupies the position of a paid agent of the company, and if he neglects his statutory duties to creditors or contributories, he will be liable to them in damages. He will also be liable for misfeasance if he pays money to a person who has no claim against the company. *Windsor Steam Coal Co., In re*, (1929) 1 Ch. 151.

Prior to the amendment of the Act in 1936, the powers and duties of a liquidator in a voluntary winding-up were dealt with in s. 207 of the Act. Since the amendment, however, they are to be found in s. 212 with material additions and alterations. This section is based upon s. 248 of the English Act, 1929.

Firstly, the liquidator may, in the case of a member's voluntary winding-up, with the sanction of an extraordinary resolution of the company, and in the case of creditors' voluntary winding-up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by cls. (d), (e), (f) and (h) of s. 179 to a liquidator on a compulsory winding up. The exercise of these powers or any of them, however, shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

Secondly, he may, without being in need of any sanction whatever, exercise any of the other powers given by the Act to the liquidator in a compulsory winding up. These powers, it will be remembered, include the power to carry on the business of the company so far as may be necessary for the beneficial winding-up of the company. If, therefore, in the proper exercise of this power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the

commencement of the winding-up. In *re Great Eastern Electric Company, Limited*, (1941) Ch. 241. He has, however, no inherent power to refer disputes on behalf of the company to arbitration nor can such power be claimed for him as an incidental power in relation to any of his express powers under the Act. *Dunichand & Co. v. Narain Das & Co.*, A.I.R. (1947) Lah. 355 (F.B.).

Thirdly, he may exercise the Court's power of making calls.

Fourthly, he may exercise the Court's power of settling the list of contributories which shall be *prima facie* evidence of the liability of persons named therein

Lastly, he may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

The only duty of a liquidator as prescribed by the section is that he shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

Where several liquidators are appointed any of the powers as aforesaid may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination, by any number not less than two.

### (3) IN A WINDING UP UNDER SUPERVISION

In a winding-up subject to supervision of the Court, the Court may appoint a liquidator in addition to the liquidator already appointed, and he will have the same powers as if he had been appointed in the voluntary liquidation. Similarly the Court may remove any liquidator, already appointed and continued by the Court or appointed by the Court, and may also fill any vacancy.

#### Powers and duties of a Liquidator

As a result of the discretion of the Court in making the supervision order, and appointing a liquidator as aforesaid, it follows that the liquidator in such a case can exercise all powers without the sanction of the Court as in a voluntary winding-up, but subject to such restrictions as may be imposed by the Court while making the supervision order and the appointment of a liquidator, if any. In other words, though no liquidator is appointed by the Court, it has got a discretion while making the supervision order to restrict the powers of the liquidator already appointed by the company.

#### LIQUIDATOR'S POWER OF DISCLAIMER

The new s 230A introduced by the Amendment Act, 1936, confers a new power upon a liquidator in any winding-up to disclaim land burdened with covenants, stocks and shares, unprofitable contracts or other property which is unsaleable. The section is almost a *verbatim* reproduction of s. 267 of the English Act, 1929.

The liquidator in connection with any such property may have attempted to sell the property or exercised some act of ownership over it. Still, he may, with the leave of the Court and subject to the provisions of the section, disclaim it by writing signed by him at any time within 12 months after the commencement of the winding-up or such extended time as may be allowed by the Court. If any such property does come to the knowledge of the liquidator within a month after the commencement of the winding-up, the power to disclaim may be exercised within 12 months or such extended time as may be allowed after he has become aware thereof. The Court may, however, before granting leave, require notices to be given to persons interested in the property sought to be disclaimed.

The power to disclaim, however, is subject to one restriction. Where an application in writing has been made to the liquidator by any person interested in the property requiring him to decide whether he will or will not disclaim and the liquidator does not, within 28 days after the receipt of the application or such further time as may be allowed by the Court, notify to the applicant his intention to apply to the Court for leave to disclaim, the company shall be deemed to have adopted the property. In case of a contract, the liquidator instead of notifying any such intention should definitely disclaim the same within the like period, otherwise the company shall be deemed to have adopted it.

#### **Application to rescind contracts**

Apart from the liquidator's power to disclaim, even any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, may apply to the Court for proper reliefs. The Court, in such a case, may make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, and any damages payable under such order to any person may be proved by him as a debt in the winding up.

#### **Vesting order**

In the event of any disclaimer under this section, the Court may, on an application by any person interested in the disclaimed property who is under any liability not discharged by the Act in respect of any such property, make an order for the vesting of the property in or delivery thereof to any person entitled thereto or by way of compensation. Such order itself would be enough to vest the property in the person specified without any assignment or conveyance for the purpose.

Where the disclaimed property is of leasehold nature, the Court shall not make such vesting order in favour of a sub-lessee or mortgagee of the company except upon the terms that he shall be subject



to the same liabilities and obligations as those to which the company was subject under the lease at the date of the winding-up or that he shall be subject only to the same liabilities and obligations as if the lease had been assigned to that person at the date. Where the terms of the vesting order are not accepted by the under-lessee or the mortgagee, he shall be excluded from all interest in and security upon the property. The Court, in that event, may make the vesting order in favour of any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed from all estates, incumbrances and interests created therein by the company.

If as a result of a disclaimer, any person is in any respect injured, he shall be deemed to be a creditor of the company to the amount of the injury, and may prove it as a debt in the winding-up.

#### LIQUIDATOR'S DUTY AS TO PENDING WINDING-UP

S. 244 of the Act imposes a duty upon a liquidator in every kind of winding-up to file in Court or with the Registrar, as the case may be, a statement in the prescribed form with respect to the proceedings of the liquidation once in each year and at intervals of not more than 12 months, if the winding-up has not concluded in a year. Where such statement is filed in Court, a copy thereof should also simultaneously be filed with the Registrar. The statement will be open to inspection by any creditor or contributory of the company at all reasonable times on the payment of the prescribed fee. He may also get a copy of the statement or an extract therefrom, if desired.

#### LIQUIDATOR'S DUTY AS TO PAYMENT INTO BANK

Another duty of a common type applicable to a liquidator in any winding-up is imposed by the new s. 244A, namely, that he should open a special banking account and pay all sums received by him as liquidator into such account.

As regards a liquidator in a compulsory winding-up, however, he is required to pay such money into a scheduled bank as defined in s. 2(e) of the Reserve Bank of India Act, 1934, unless he is otherwise ordered by the Court for reasons of advantage to the creditors or contributories. In any case, he cannot retain with himself any sum exceeding Rs. 500 or such other amount as the Court may authorise for more than 10 days. If he does so retain it, he shall, unless a satisfactory explanation is tendered, pay interest on the amount so retained in excess at the rate of 20 per cent per annum and shall further be liable to disallowance of all or such part of his remuneration as the Court may think fit. He may also be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

## LIQUIDATOR'S DUTY AS TO UNCLAIMED DIVIDENDS, ETC.

There has been imposed on a liquidator yet another duty by s. 244B which was inserted by Act XXXVI of 1940, and it relates to how he must deal with unclaimed dividends and undistributed profits during the winding-up and on the dissolution of the company. The first sub-section of this section provides that, if the liquidator has in his hands or control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, he shall forthwith pay that money into the Reserve Bank of India to the credit of the Companies Liquidation Account. It also provides that he shall similarly pay into that account any money representing unclaimed dividends or undistributed assets in his hands at the date of the dissolution of the company. The receipt of the Reserve Bank of India for the money so paid shall be an effectual discharge of the liquidator in respect thereof as provided by sub-section (3). It may be noticed, however, that where the company is being wound up by the Court, the liquidator under the preceding section 244A is required to pay all moneys received by him as such into a scheduled bank, and sub-section (4) of this new s. 244B, therefore, provides that, in such a case, the liquidator shall make the payment into the Companies Liquidation Account by transfer from the account in such bank. Where the company is wound up voluntarily, or subject to the supervision of the Court, the same sub-section provides that the liquidator shall, when filing a statement in pursuance of sub-section (1) of s. 244 as regards proceedings in liquidation noticed above, indicate the sum of money which is payable to the Reserve Bank of India as unclaimed dividends or undistributed profits and which he has had in his hands for six months preceding the date to which the statement is brought down, and pay that sum into the Companies Liquidation Account within 14 days of the date of filing that statement. Sub-section (2) of this new section requires the liquidator, when making any such payment, to furnish to such officer as the Central Government may appoint in that behalf a statement in the prescribed form setting forth the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto.

It is not to be assumed, however, that the persons entitled to participate in the sums so paid into the Companies Liquidation Account have lost their right for ever. Sub-section (5) of the section, on the contrary, leaves liberty to such persons to apply to the Court, for an order for payment of any of these sums due to them, and the Court, after calling upon such officer as the Central Govern-

ment may appoint in that behalf to show cause within one month from the date of the service of the notice why the order should not be made and hearing his objections, if any, may make the necessary order if it is satisfied about their claim.

The next sub-section provides for a further disposition of the sums paid into the Companies Liquidation Account after they have remained unclaimed for a period of fifteen years. It says that the sums shall then be transferred to the general revenue account of the Central Government subject, of course, to any claim that may be allowed under the foregoing sub-section as if such transfer had not been made.

Sub-section (7) enacts a similar penalty, in case of default of the liquidator in paying into the Companies Liquidation Account any money as required by sub-section (1) to the one on his failure to deposit in the banking account such sums as he is required to do under s. 244A already referred to.

Lastly, in sub-sec (8) of the section it is stated that nothing in the section shall apply in relation to companies with objects confined to a single Province which are not trading corporations.

### WINDING UP OF UNREGISTERED COMPANIES

It is not every company which is not registered under the present Act which may be wound up. S. 270 defines what an unregistered company means in so far as the Act authorizes such company to be wound up. It says that such company shall include any partnership, association or company consisting of more than seven persons save and except a railway company incorporated by an act of Parliament or by an Indian law or a company registered under the Indian Companies Act of 1866 or any act repealed thereby or under the Indian Companies Act of 1882 or under this Act.

It may be noted that the section makes no reference to a foreign company which, though carrying on business in British India, is not registered under the Act. Still, as the section specifies any partnership, association or company, irrespective of its domicile, it would be correct to include a foreign company in the expression 'unregistered company' if it consists of more than seven members. In that view of the matter, if a foreign company consists of seven or less than seven members, it cannot be wound up in British India though it may be a registered company in the country of its domicile. Such a restriction led to a number of hardships which were only recently perceived in England and, therefore, it was provided in s. 337 of the Act of 1929 that the provisions as to the composition of the company shall not apply to a foreign company. Cl. (3) of that section is in these terms:

"A partnership, association or company which consist of less than eight members and is not a foreign partnership, association or company."

The clause is stated to be one of the exceptions of the definition of 'an unregistered company.'

It may be noted that prior to the removal of the restriction as regards foreign companies, it was held under s. 199 of the Act of 1862 that an unregistered company could not be wound up unless there were more than seven members. In *re Bowling and Welby's contract*, (1895) 1 Ch. 663.

S. 270 of the Indian Act is undoubtedly based on s. 267 of the English Act of 1908. But this latter section did not improve the situation in this behalf. S. 199 of the Act of 1862 and s. 267 of the Act of 1908 corresponded to each other and, therefore, the position of a foreign company consisting of seven or less than seven members under the former remained unaltered under the latter. Consequently, the same position would also be maintained under s. 270 of the Indian Act. This view is supported by a decision of the Rangoon High Court in *V. E. R. M. Chettyar Firm v. J. Hormusji*, 8 Rang. 658.

In a case decided by the Bombay High Court, however, it has been held that an unregistered foreign company, even though not consisting of more than seven members, may be ordered to be wound up under ss. 270 and 271 if it has an office and assets in British India. In *re Strauss & Co. Ltd.*, 38 Bom. L. R. 1080. Rangnekar J. who decided that case observed on the authorities that were cited in support of the view aforesaid that he was unable to hold that they were conclusive of the question he had to determine and referred to the *obiter dictum* of Swinfen Eady J. in *Re New York and Continental Line*, (1909) 54 S. J. 117:

"In his Lordship's view, as at present advised, there was much to be said for the construction of that Act (of 1908) which the petitioners set up."

From the judgment, it, however, appears that the decision is based more on s. 337 of the English Act of 1929 than upon the interpretation of the word 'include' used in s. 270 of the Indian Act. Even the widest interpretation of this word, it is submitted, cannot do away with the express condition as regards the number of members provided in the section for any company, partnership or association to be liable to be wound up as an unregistered company.

Apart from this conflict of decisions on the point, even the Amendment Act, 1936, has not introduced this exception in case of foreign companies in s. 270 of the Act. The only amendment that it has made is in s. 271 to which a new clause based upon sub-sec. (2) of s. 337 of the English Act, 1929, is added stating that a foreign company carrying on business in British India may be wound up as an unregistered company on its ceasing to carry on such business,

notwithstanding that it has been dissolved or otherwise ceased to exist under the law of its domicile. This provision, it is submitted, does not override the provisions of s 270 which has for its purpose only the defining of an 'unregistered company'. If the legislature had intended otherwise, they could have either redrafted s 270 in terms of s. 337 of the English Act of 1929 or included a foreign company in the definition of an 'unregistered company' irrespective of the number of its members or in any other manner whatsoever.

It may be noted that the number of members for the purpose of s 270 is to be counted as on the date of the petition for winding up. Past members cannot be included in such calculation. In *re Bowling and Welby's contract*, and *Weldy's contract*, (*supra*)

#### Can an Illegal Association be wound up?

The subject of an illegal association has been treated in the first lecture and cases have also been cited showing whether or not an illegal association could be ordered to be dissolved. It appears from those cases, however, that s 270 of the Act has not been referred to in this connection in any of them. It may, therefore, be interesting to consider whether any company, association or partnership which is illegal under s 4 of the Act would not none the less be liable to be wound up under s 270 as an 'unregistered company'. If it could be successfully contended that such company, association or partnership is wholly outside all the provisions of the Act and, therefore, s 270 cannot apply to it, the scope of s 270, would be simply restricted to a company, association or partnership consisting of more than seven members and less than eleven, where the business is of banking, and less than twenty-one where the business is of any other kind. It is debatable whether the section could be narrowed down in that manner when it does not contain the slightest indication to justify that course. There is so far no judicial pronouncement in favour of one view or the other.

#### Mode of winding up

Now, such unregistered company cannot be wound up under the Act either voluntarily or under the supervision of the Court. It can only be wound up compulsorily, and nearly all the provisions of the Act in regard to compulsory winding up apply to the winding up of such unregistered company, subject to the following exceptions and additions thereto:

(1) An unregistered company for the purpose of determining the Court having jurisdiction in respect of the winding up thereof shall be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business in more than one province, in each of such provinces, and the principal place of business situate in that province in which proceedings

are being instituted shall be deemed to be the registered office of the company;

(2) The circumstances under which an unregistered company may be wound up are: (a) if the company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; or (c) if the Court is of the opinion that it is just and equitable that the company should be wound up:

(3) Such company shall be deemed to be unable to pay its debts (a) if a creditor claiming a sum exceeding a sum of Rs. 500 has served on the company a demand under his hand for the payment thereof, and the company has for three weeks thereafter failed to pay it or to secure or compound for it to the satisfaction of the creditor; (b) if any suit or legal proceeding has been instituted against any member for any debt due from the company or from him in his character of a member, and notice in writing of the institution thereof having been served on the company, the company has not within ten days thereafter paid, secured or compounded for the said debt, or indemnified the defendant against all costs, damages and expenses to be incurred by him by reason of the same; (c) if execution or other process issued on any decree or order against the company or any member thereof is returned unsatisfied; and (d) if it is otherwise proved to the Court that the Company is unable to pay its debts. (S. 271).

In the event of an unregistered company being wound up under the aforesaid provisions, every person who is liable to pay or contribute to the payment of any debt or liability of the company or for the adjustment of the rights of the members *inter se* or of the payment of costs, charges and expenses of winding up shall be deemed to be a contributory. In the event of any contributory dying or being adjudged insolvent, the provisions of the Act in that behalf shall apply. (S. 272). Similarly, after the presentation of a petition for winding up and before the making of the order thereon, the Court may stay all suits and proceedings against the company or any of its members on the application of a creditor of the company, and after the order is made no suit or proceeding shall be commenced or proceeded with against any contributory of the company except by leave of the Court and subject to such terms as the Court may impose. (Ss. 273 and 274).

If the unregistered company has no power to sue or be sued in a common name, or if for any reason it appears expedient, the Court may order all or any of the properties, actionable claims, and obligations of the company to vest in the official liquidator in his official capacity, subject to any indemnity such liquidator may be ordered to give. Thereupon, the liquidator may, according to the directions

of the Court, bring or defend in his official name any suit or other legal proceeding relating to the property, or necessary to be brought or defended for the purpose of effectually winding up the company and recovering its property. (S. 275). The next section provides that the aforesaid provisions shall be in addition to, and not in restriction of any provisions contained in the Act with respect to winding up of companies by the Court and the Court or the official liquidator may exercise any powers or do any acts in case of unregistered companies which may be exercised or done by it or him in winding up companies formed and registered under the Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act and then only to the extent provided by the Act.

### DEFUNCT COMPANIES

There may be cases where a company is not legally dissolved when it ought to be so dissolved. In such cases, the name of the company continues on the register of companies in the Registrar's office for no purpose whatever. As a matter of fact, it seems to be the intention of the legislature that the register of companies must contain names of such companies which are actually doing business in pursuance of their memorandum of association. And, therefore, the Act confers a power on the Registrar of Companies to strike the name of a company off his register when it appears to him that it is not in operation, or, where it is being wound up, he finds reason to believe that no liquidator is acting or, in spite of the affairs of the company being completely wound up, no returns have been made by the liquidator as required by the Act for a period of six consecutive months after notice demanding the returns has been sent by post to the company or the liquidator at his last known place of business. (S. 247).

The section also lays down the steps which the Registrar should take in such cases. Where he has a reasonable cause to believe that a company is not in operation, he shall send to the company by post a letter inquiring whether it is in operation. If he does not, within one month of sending the letter, receive any answer thereto, he shall within 14 days after the expiration of the month send to the company by post a registered letter referring to the first letter and stating that no answer thereto has been received, and that if an answer is not received to the second letter within a month from the date thereof, a notice will be published in the local *Official Gazette* with a view to striking the name of the company off the register. If the Registrar receives an answer stating that the company is not in operation or if no answer is received within one month after sending

the second letter, he may publish in the local *Official Gazette* and send to the company by post a notice that on the expiration of three months from the date of the notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company dissolved.

In the two other cases also, namely, where no liquidator is acting, or where no returns are made by the liquidator, the Registrar may publish in the local *Official Gazette* and send to the company a similar notice. On the expiration of the time mentioned in such notice, the Registrar may, unless cause is shown to the contrary, strike its name off the register and shall publish notice thereof in the local *Official Gazette*, and on such publication the company shall be dissolved provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

If the company or any member or creditor thereof feels aggrieved by the removal of the company's name from the register, the Court may, on the application of such aggrieved party, order the name of the company to be restored to the register, if it is satisfied that the company was in operation at the time of striking off its name or that otherwise it is just and proper that it should be restored to the register, and make such provisions as may seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

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# THE INDIAN COMPANIES' ACT

(VII of 1913)

[27 March, 1913]

**An Act to consolidate and amend the law relating to Trading Companies and other Associations**

**WHEREAS** it is expedient to consolidate and amend the law relating to Trading Companies and other Associations, It is hereby enacted as follows —

## PART I

### PRELIMINARY

**1 Short title, commencement and extent** (1) This Act may be called the Indian Companies Act, 1913

(2) It shall come into force on the first day of April 1914 and

(3) It extends to the whole of British India, including British Baluchistan and the Santhal Parganas

**2 Definitions** (1) In this Act unless there is anything repugnant in the subject or context,—

(1) 'articles' means the articles of association of a company as originally framed or as altered by special resolution including so far as they apply to the company the regulations contained (as the case may be) in Table B in the Schedule annexed to Act No XIX of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act 1882 or in Table A in the First Schedule annexed to this Act

(2) 'company' means a company formed and registered under this Act or an existing company

(3) 'the Court' means the Court having jurisdiction under this Act

(4) 'debenture' includes debenture stock

(5) 'director' includes any person occupying the position of a director by whatever name called

(6) "District Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction

(7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882

(8) "Insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses

(9) "manager" means a person who subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position

of a manager by whatever name called and whether under a contract of service or not:

(9A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever named called

**Explanation**—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purposes of this Act

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act

(11) "officer" includes any director, managing agent, manager or secretary but, save in sections 235, 236 and 237, does not include an auditor

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the Central Government

(13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares if any and

(b) limits the number of its members to fifty not including persons who are in the employment of the company and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition be treated as a single member

(13A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882 or under the Indian Companies Act, 1866, or under any Act, repealed thereby, which is not a private company

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debenture of a company but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied

(17) "trading corporation" means a trading corporation within the meaning of Item 33 in List I in the Seventh Schedule to the Government of India Act, 1935

(2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company, or

(b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company, that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression 'subsidiary company' in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company:

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.

**2A. Provisions as to companies registered in Burma or Aden before separation from India.**—Notwithstanding anything in the last preceding section, a company which was immediately before the separation of Burma and Aden from India a company as defined by the said section, being a company the registered office whereof is in Burma or Aden,—

(a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India, and

(b) shall not, unless the subject-matter or context so requires, be included in the expressions 'company', 'existing company', 'public company', and 'private company':

Provided that—

(i) for the purposes of section 277 of this Act such a company shall, for a period of six months from the separation, be deemed to be a company incorporated and registered in British India;

(ii) the separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before the date, was void against the liquidator or creditors of such a company.

**3. Jurisdiction of the Courts.** (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate:

Provided that the Central Government may, by notification in the official Gazette and subject to such restrictions and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purpose of jurisdiction to wind up companies, the expression 'registered office' means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

## PART II.

## CONSTITUTION AND INCORPORATION

**4. Prohibition of partnership exceeding certain number.** (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law or of Royal Charter or Letters Patent

(2) No company association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other Indian law or of Royal Charter or Letters Patent

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership in computing the number of persons for the purposes of this section minor members of such families shall be excluded

(4) Every member of a company association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees

P. 7

## MEMORANDUM OF ASSOCIATION

**5 Mode of forming incorporated company** Any seven or more persons (or, where the company to be formed will be private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

(i) a company having the liability of its members limited by the memorandum to the amount, if any unpaid on the shares respectively held by them (in this Act termed a company limited by shares), or

(ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee), or

(iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company)

P. 19

**6. Memorandum of company limited by shares** In the case of a company limited by shares—

(1) the memorandum shall state—

(i) the name of the company, with "Limited" as the last word in its name,

P. 19

(ii) the province in which the registered office of the company is to be situate,

P. 21

(iii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend; P. 21

(iv) that the liability of the members is limited; P. 25

(v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount; P. 25

(2) no subscriber of the memorandum shall take less than one share: P. 26

(3) each subscriber shall write opposite to his name the number of shares he takes. P. 26

**7. Memorandum of company limited by guarantee.** In the case of a company limited by guarantee—

(1) the memorandum shall state—

(i) the name of the company, with "Limited" as the last word in its name;

(iii) the objects of the company, and except in the case of trading corporations, the territories to which they extend;

(iv) that the liability of the members is limited,

(v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding a specified amount. P. 19

(2) If the company has a share capital—

(i) the memorandum shall also state the amount of share capital with which the Company proposes to be registered and the division thereof exceeding a specified amount: P. 19

(ii) no subscriber of the memorandum shall take less than one share;

(iii) each subscriber shall write opposite to his name the number of shares he takes. P. 26

**8. Memorandum of unlimited company.** In the case of an unlimited company—

(1) the memorandum shall state—

(i) the name of the company;

(ii) the province in which the registered office of the company is to be situate;

(iii) the objects of the company, and, except in the case of trading corporations, the territories to which they extend; P. 19

(2) if the company has a share capital—

(i) no subscriber of the memorandum shall take less than one share;

(ii) each subscriber shall write opposite to his name the number of shares he takes. P. 26

**9. Printing and signature of memorandum.** The memorandum shall—

- (a) be printed
- (b) be divided into paragraphs numbered consecutively, and
- (c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature.

P. 19

**10. Restriction on alteration of memorandum.** A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this act

Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition

P 18

**11. Name of company and change of name.** (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires

(2) If a company, through inadvertance or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name

(3) Except with the previous consent in writing of the Central Government, no company shall be registered by a name which -

(a) contains any of the following words, namely, 'Crown', 'Emperor' 'Empire', 'Empress', 'Federal', 'Imperial' 'King', 'Queen', 'Royal', 'State', 'Reserve Bank', 'Bank of Bengal', 'Bank of Madras', 'Bank of Bombay', or any word which suggests or is calculated to suggest the patronage of His Majesty's Government or any department thereof, or

(b) contains the word 'Municipal' or 'Chartered' or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter.

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act

(4) Any company may, by special resolution and subject to the approval of the Central Government signified in writing, change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceeding, that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name

P. 19

**12. Alteration of Memorandum.** (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently; or
  - (b) to attain its main purpose by new or improved means; or
  - (c) to enlarge or change the local area of its operations; or
  - (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
  - (e) to restrict or abandon any of the objects specified in the memorandum; or
  - (f) to sell or dispose of the whole or any part of the undertaking of the company; or
  - (g) to amalgamate with any other company or body of persons.
- (2) The alterations shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section. P. 26

**13. Power of Court when confirming alteration.** The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper. P. 27

**14. Exercise of discretion by Court.** The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase. P. 27

**15 Procedure on confirmation of the alteration.** (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and

the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the company with the registrar in each of such provinces, and each of such registrars shall register the same and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper. P. 27

16. **Effect of failure to register within three months.** No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month. P. 27

#### ARTICLES OF ASSOCIATION

17. **Registration of articles.** (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81 and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115, and 116 contained in that Table.

Provided that regulations 78, 79, 80, 81, and 82 shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company:

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.



(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration P 29

18. Application of Table A. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A, in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles P 29

19. Form and signature of articles. Articles shall—

(a) be printed,

(b) be divided into paragraphs numbered consecutively, and

(c) be signed by each subscriber of the memorandum (who shall add his address and description) of association in the presence of at least one witness who must attest the signature P 30

20. Alteration of articles by special resolution (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No XIX of 1857 and Act No VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares notwithstanding that those regulations are contained in the memorandum P 34

20A. Effect of alteration in memorandum or articles. Notwithstanding anything in the memorandum of articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby P 34

## GENERAL PROVISIONS

21. Effect of memorandum and articles. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company

P 30

**22. Registration of memorandum and articles.** The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them

P. 45

**23. Effect of registration.** (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act

P 45

**24. Conclusiveness of certificate of incorporation.** (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance

P 46

**25. Copies of memorandum and articles to be given to members.**

(1) Every company shall send to every member, at his request and within fourteen days thereof on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any)

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees

**25A. Alteration of memorandum or articles to be noticed in every copy.** (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.

**26. Power to dispense with "Limited" in name of charitable and other companies** (1) Where it is proved to the satisfaction of the Central Government that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, religion, charity or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects and to prohibit the payment of any dividend to its members, the Central Government may, by license under the hand of one of its Secretaries direct that the association be registered as a company with limited liability, without the addition of the word "Limited", to its name, and the association may be registered accordingly

(2) A license by the Central Government under this section may be granted on such conditions and subject to such regulations as the Central Government thinks fit, and those conditions and regulations shall be binding on the association and shall if the Central Government so directs, be inserted in the memorandum and articles, or in one of those documents

(3) The association shall on registration enjoy all the privileges of limited companies and be subject to all their obligations except those of using the word Limited as any part of its name and of publishing its name and of sending lists of members to the registrar

(4) A license under this section may at any time be revoked by the Central Government, and upon revocation the registrar shall enter the word Limited at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section

Provided that before a license is so revoked, the Central Government shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation

P. 20

#### COMPANIES LIMITED BY GUARANTEE

**27 Provision as to companies limited by guarantee.** (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the commencement of this Act, purporting to divide the undertaking of the company, into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby )-

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## PART III

## SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS

## DISTRIBUTION OF SHARE CAPITAL.

**28. Nature of shares.** (1) The shares or other interest of any member in a company shall be moveable property, transferable in manner provided by the articles of the company. P. 91

(2) Each share in a company having a share capital shall be distinguished by its appropriate number. P. 94

**29. Certificate of shares or stock.** A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the share or stock therein specified. P. 91

**30. Definition of "Member."** (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. P. 62

**31. Register of members.** (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

(i) the names and addresses, and the occupations, if any, of the members and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;

(ii) the date at which each person was entered in the register as a member;

(iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty. P. 70

**31A. Index of members of company.** (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

(2)<sup>a</sup> The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(8) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees. P. 71

32. Annual list of members and summary. (1) Every company having a share capital shall within eighteen months from its incorporation and thereafter once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

(a) the amount of the share capital of the company, and the number of the shares into which it is divided;

(b) the number of shares taken from the commencement of the company up to the date of the return;

(c) the amount called up on each share,

(d) the total amount of calls received,

(e) the total amount of calls unpaid;

(f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount in respect of any shares or debentures, since the date of the last return or so much thereof as has not been written off at the date of the return;

(g) the total number of shares forfeited;

(h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;

(i) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

(k) the number of shares or amount of stock comprised in each share-warrant;

(l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers or managing agents of the company, and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place; and

(m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within twenty-one

days after the day of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid<sup>4</sup>

(4) A private company shall send with the annual return required by sub-section (1) a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-section (1) of section 2 are not to be included in reckoning the number of fifty

(5) If a company make default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

P 73

33. **Trusts not to be entered on register** No notice of any trust, expressed, implied or constructive shall be entered on the register, or be receivable by the registrar

P 69

34. **Transfer of shares** (1) An application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided that where such application is made by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee and subject to the provisions of sub-section (7) the company shall, unless objection is made by the transferee within two weeks from the date of receipt of the notice enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee

(2) For the purposes of sub-section (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with scrip

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit

(4). If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal

(5) If default is made in complying with sub-section (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

(6) Nothing in sub-section (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares

P 91

35. **Transfer by legal representative.** A transfer of the share or other interest of a deceased member of a company made by his legal representative shall although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer

36. **Inspection of register of members.** (1) The register of members, commencing from the date of the registration of the company and the index of members shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe, for each inspection. Any such member or other person may make extracts therefrom

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of the company are closed, commencing on the day next after the day on which the requirement is received by the company.

(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.

P. 72

37. **Power to close register.** A company may, on giving seven days' previous notice by advertisement, in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole forty-five days in each year but not exceeding thirty days at a time. P. 72

### 38. Power of Court to rectify register. (1) If—

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code. P. 72

39. Notice to registrar of rectification of register. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to be filed with the registrar within a fortnight from the date of the completion of the order. P. 73

40. Register to be evidence. The register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. P. 71

41. Power for company to keep branch register in the United Kingdom. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues. P. 71

42. Regulations as to British register. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).



(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made, and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register

(4) Subject to the provision of this section with respect to the duplicate register the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register

(5) The company may discontinue to keep any British register and thereupon all entries in that register shall be transferred to the principal register

(6) Subject to the provisions of this Act any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register

P 71

**42A Application of sections 41 and 42 to Burma** (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register

**43. Issue of share-warrants to bearer** (1) A company limited by shares, if so authorised by its articles, may with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant

(2) Nothing in this section shall apply to a private company

P 96

**44 Effect of share-warrant.** A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant

P 96

**45 Registration of name of bearer of share-warrant** The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members, and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled

P 96

**46. Position of bearer of share-warrant.** The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full

extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles. P. 96

**47. Entries in register when share-warrant issued.** (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely —

- (i) the fact of the issue of the warrant,
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number, and
- (iii) the date of the issue of the warrant

(2) If a company makes default in complying with the requirements of this section it shall be liable to fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty P. 96

**48 Surrender of share-warrant.** Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members, and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member P. 96

**49. Power of company to arrange for different amounts being paid on shares.** A company, if so authorised by its articles, may do any one or more of the following things, namely —

- (1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;
- (2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up,
- (3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others. P. 98

**50 Power of company limited by shares to alter its share capital.**

(1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

- (a) increase its share capital by the issue of new shares of such amount as it thinks expedient;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares,
- (c) convert all or any of its paid-up shares into stock and reconvert that stock into paid-up shares of any denomination,
- (d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any,

unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived,

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled

(2) The power conferred by this section must be exercised by the company in general meeting

(3) A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(4) The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof

P 78

**51. Notice to registrar of consolidation of share capital, conversion of shares into stock, etc.** (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or re-conversion, file notice with the registrar of the same, specifying the shares consolidated and divided, or converted, or the stock re-converted

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

P 79

**52. Effect of conversion of shares into stock.** Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock, and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act

P 84

**53. Notice of increase of share capital or of members.** (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase

(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.

(3) If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty P 79

#### REDUCTION OF SHARE CAPITAL

**54A. Restrictions on purchase by company or loans by company for purchase of its own shares.** (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by sections 55 to 66

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under section 105B P 82

**55. Reduction of share capital.** 1) Subject to confirmation by the Court, a company limited by shares if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets, or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly

(2) A special resolution under this section is in this Act called a resolution for reducing share capital P 80

**56. Application to Court for confirming order.** Where a Company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction. P 80

**57. Addition to name of company of "and reduced."** On and from the passing by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any li-

in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the making of the order confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced"

P 81

#### 58. Objections by creditors and settlement of list of objecting creditors.

(1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction

(2) The Court shall settle a list of creditors so entitled to object and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction

P 80

59. Power to dispense with consent of creditor on security being given for his debt. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating as the Court may direct, the following amount (that is to say),—

(i) if the company admits the full amount of his debt or claim or though not admitting it, is willing to provide for it then the full amount of the debt or claim,

(ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court

P 80

60. Order confirming reduction The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit

P 80

61. Registration of order and minute of reduction (1) The registrar on production to him of an order of the Court confirming the reduc-

tion of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect

(3) Notice of the registration shall be published in such manner as the Court may direct

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute

P 81

62. Minute to form part of memorandum (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration

(2) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

63. Liability of members in respect of reduced shares (1) A member of the company past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid on (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable within the meaning of the provisions of this Act with respect to winding up by the Court to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration, and

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up

(2) Nothing in this section shall affect the rights of the contributors among themselves. P. 31

63. Penalty on concealment of name of creditor. If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, every such officer shall be punishable with imprisonment which may extend to one year or with fine, or with both

64. Publication of reasons for reduction. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction P. 30

65. Increase and reduction of share capital in case of a company limited by guarantee having a share capital. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act

#### VARIATION OF SHAREHOLDERS' RIGHTS

66A. Rights of holders of special classes of shares. (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent, of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section must be made within fourteen days after the date on which the consent was given, or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation

(4) The decision of the Court on any such application shall be final

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of

the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression 'variation' in this section includes 'abrogation' and the expression 'varied' shall be construed accordingly P 83

#### REGISTRATION OF UNLIMITED COMPANY AS LIMITED

67. Registration of unlimited company as limited. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act P 175

68. Power of unlimited company to provide for reserve share capital on re-registration. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely -

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up,

(b) provided that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up P 175

#### RESERVE LIABILITY OF LIMITED COMPANY

69. Reserve liability of limited company. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for purposes aforesaid P 78

#### UNLIMITED LIABILITY OF DIRECTORS

70. Limited company may have directors with unlimited liability. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited



**11** **THE LIMITED LIABILITY ACT** **11**  
(2) In a limited company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default. P. 129

71. Special resolution of limited company making liability of directors unlimited. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

\* (2) Upon the passing of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum. P. 130

## **PART IV.**

### **MANAGEMENT AND ADMINISTRATION**

#### **OFFICE AND NAME**

72. Registered office of company. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business. P. 21

73. Publication of name by a limited company. Every limited company—

(a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters,

and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place,

(b) shall have its name engraven in legible characters on its seal;

(c) shall have its name mentioned in legible English characters in all billheads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company. P. 20

**74. Penalties for non-publication of name.** (1) If a limited company does not paint or affix, and keep painted or affixed its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company

**75. Publication of authorised as well as subscribed and paid-up capital.** (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees

## MEETINGS AND PROCEEDINGS

**76. Annual general meeting.** (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of

the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company

P 137

**77. Statutory meeting of Company.** (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

(a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted,

(b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid,

(c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares,

(d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation,

(e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification,

(f) the extent to which underwriting contracts, if any, have been carried out,

(g) the arrears, if any, due on calls from directors, managing agents and managers, and

(h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company, a director thereof

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares

and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The director shall cause a copy of the statutory report certified as required by this section to be delivered to the registrar for registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company. P. 136

**76. Calling of extraordinary general meeting on requisition.** (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so-called shall be held within three months from the date of the deposit of the requisition.

(4) Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

(3) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default

P 138

79. Provisions as to meetings and votes. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf —

(a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing, but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit,

(b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression 'Table A' means that Table as for the time being in force, but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting,

(c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll. Provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll,

(d) an instrument appointing a proxy, if in the form set out in regulation 87 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles, and

(e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf —

(a) two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent in number of the members of the company may call a meeting,

(b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum,

(c) any member elected by the members present at a meeting may be chairman thereof,

(d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred

shares of stock held by him, and in any other case every member shall have one vote;

(e) on a poll votes may be given either personally or by proxy;

(f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation, either under seal or under the hand of an officer or an attorney duly authorised, and

(g) a proxy must be a member of the company

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted

P 140

80. Representation of companies at meetings of other companies of which they are members. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company

P 68

81. Extraordinary and special resolutions. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

(3) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution

(4) At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll may be demanded

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct; it may,

if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company or under this Act

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, or under this Act

P. 142

### 82. Registration and copies of special and extraordinary resolutions.

(1) A copy of every special and extraordinary resolution shall, within fifteen days from the passing thereof be printed or typewritten and duly certified under the signature of an officer of the company and filed with the registrar who shall record the same

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made

(6) Every officer of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default

P. 143

### 83. Minutes of proceedings of general meetings and of its directors.

(1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1938, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(3) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words

(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine not exceeding twenty-five rupees for every day during which the default continues

(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them

P 145

## DIRECTORS

**83A. Directors obligatory.** (1) Every company shall have at least three directors

(2) This section shall not apply to a private company except a private company being a subsidiary company of a public company

P 122

**83B. Appointment of directors.** (1) In default of and subject to any regulations in the articles of a company other than a private company—

(i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed,

(ii) the directors of the company shall be appointed by the members in general meeting and

(iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director

(2) Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section

P 122

**84. Restrictions on appointment or advertisement of director.** (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registra-



tion of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(i) signed and filed with the registrar a consent in writing to act as such director; and

(ii) save in the case of companies not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) or taken from the company and paid or agreed to pay for his qualification shares or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name

(2) On the application for registration of the memorandum and articles, (if any), of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented,<sup>v</sup> the applicant shall be liable to a fine not exceeding five hundred rupees

(3) This section shall not apply to a private company or a company which was a private company before becoming a public company nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business

P 123

**85. Qualification of director.** (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles

(2) If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director

P 123

**86. Validity of acts of directors.** The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid

P 123

**86A. Ineligibility of bankrupt to act as director.** (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both.

(2) In this section the expression 'company' includes a company incorporated outside British India which has an established place of business within British India

P 124

**86B. Assignment of office by directors.** If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assign-

agent of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company;

Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section,

Provided always that any such alternative or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which meetings of the directors are ordinarily held

**Explanation**—For the purposes of the provisos to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24-Parganas and Chingleput Districts respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts

F. 127

**86C Avoidance of provisions relieving liability of directors.** Same as provided in this section any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void

Provided that—

(a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1936, this section shall have effect only on the expiration of a period of six months from that date, and

(b) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and

(c) notwithstanding anything in this section, company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under section 281 of this Act in which relief is granted to him by the Court

F. 128

**86D. Loans of Directors.** (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner or to a private company of which such director is a member or director

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made

in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company

P. 123

**36E. Director not to hold office of profit** No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act

**Explanation.**—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company

P. 123

**36F. Sanction of directors necessary for certain contracts.** Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936

**36G. Removal of directors** (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936

P. 125

**36H. Restrictions on powers of directors** The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting—

(a) sell or dispose of the undertaking of the company,

(b) remit any debt due by a director

P. 129

**36I. Vacation of office of director.** (1) The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section 85 or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan, or guarantee from the company in contravention of section 86D, or

(h) he acts in contravention of section 86F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section. P. 124

**87. Register of directors, managers and managing agents.** (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say.—

(a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships;

(b) in the case of a corporation, its corporate name and registered or principal office, and the full name, address and nationality of each of its directors, and

(c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be opened to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register.

P. 133

#### MANAGING AGENTS.

**87A. Duration of appointment of managing agent.** (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed to hold office for a term of more than twenty years at a time

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then reappointed thereto or unless he has been reappointed thereto before the expiry of the said twenty years

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances if any

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company

P. 134

**87B. Conditions applicable to managing agents.** Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company

(a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power of attorney from such company shall be deemed to be an offence committed by such firm or company

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal;

(b) the office of a managing agent shall be vacated if he is adjudged insolvent;

(c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment,

(d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company,

(e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company. Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management, and

(f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86E

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth

P. 134

**87C. Remuneration of managing agent.** (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoing, depreciation, bounties or subsidies received from any Government or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the under-

taking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance P. 136

**§7D. Loans to managing agents.** (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, or to any member or director of the private company, if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent )

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936

P. 135

**§7E. Loans to or by companies under the same management.** (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally

liable for any loss incurred by the company in respect of such loan or guarantee. P. 136

**87F. Purchase by company of shares of company under the same managing agent.** A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company. P. 137

**87G. Restriction on managing agent's powers of management.** A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void P. 136

**87H. Managing agent not to engage in business competing with the business of managed company.** A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company P. 136

**87I. Limit on number of directors appointed by managing agent.** Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors P. 122

## CONTRACTS

**88. Form of contracts.** (1) Contracts on behalf of a company may be made as follows (that is to say) —

(1) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged,

(ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be P. 155

**89. Bills of exchange and promissory notes** A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority, express or implied P. 155

**90. Execution of deeds.** A company may, by writing under its common seal, empower any person, either generally or in respect of any spe-



and matters as its attorney, to execute deeds on its behalf in any place either in or outside British India; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

P. 156

31. Power for company to have official seal for use abroad. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

P. 156

31A. <sup>sup</sup>Disclosure of interest by director. (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement:

Provided that a general notice that a director is a director or a member of any specified company or is a member of any specified firm, and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.

(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees. P. 156

**91B. Prohibition of voting by interested director.** (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested nor shall his presence count for the purpose of forming a quorum at the time of any such vote, and if he does so vote, his vote shall not be counted

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or anyone or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees

(3) This section shall not apply to a private company

Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company P. 157

**91C Disclosure to members in case of contract appointing a manager.**

(1) Where a company enters into a contract for the appointment of a manager or managing agent of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, within twenty-one days from the date of entering into the contract or the varying of the contract, send an abstract of the terms of such contract or variation as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such variation, to every member, and the contract shall be open to the inspection of any member at the registered office of the company

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty P. 157

**91D. Contracts by agents of company in which company is undisclosed principal** (1) Every manager or other agent of a company other than a private company not being the subsidiary company of a public company who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company and send copies to the directors, and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.

P. 156

### PROSPECTUS

92. Filing of prospectus. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date, shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed

P. 54

93. Specific requirements as to particulars of prospectus. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

(a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively, and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption; and

(b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors, and

(c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them; and

(d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within

the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and

(e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued, and

(ee) where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations, and

(f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor. Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors, and

(ff) where any property referred to in clause (f) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus, and

(g) the amount (if any) paid or payable as purchase-money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill, and

(h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents. Provided that it shall not be necessary to state the commission payable to sub-underwriters, and

(i) the amount or estimated amount of preliminary expenses, and

(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment, and

(l) the dates of, and parties to, every material contract including contracts relating to the acquisition of property to which clause (f) applies, and a reasonable time and place at which any material contract or a copy thereof may be inspected. Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried

or intended to be carried on by the company, or to any contract (except a contract appointing or fixing the remuneration of a managing director or managing agent) entered into more than two years before the date of issue of the prospectus, and

(m) the names and addresses of the auditors (if any) of the company; and

(n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion of the company, and

(o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to the several classes of shares respectively, and

(p) where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions and

(q) where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital particulars of the amount to be so provided and the sources thereof

(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely —

(i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact,

(ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus

Provided that if in the case of a company which has been carrying on business for less than three years the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years

(1B) The statement referred to in clause ((fi) of subsection (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business

Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses shall apply to a prospectus filed in pursuance of section 154

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section

P. 49

94. Meaning of "vendor" in section 93. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(a) the purchase-money is not fully paid at the date of issue of the prospectus, or

(b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus, or

(c) the contract depends for its validity or fulfilment on the result of that issue

P. 50

95. Application of section 93 to the case of property taken on lease. Where any of the property to be acquired by the company is to be taken

on lease, section 93 shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

P. 50

96. **Invalidity of certain conditions as to waiver or notice.** (1) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void

(2) It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures or

(b) in relation to shares or debentures which were not offered to the public

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees P. 53

97. **Saving certain cases of non-compliance with section 93.** (1) If a prospectus is issued which does not comply with the provisions of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed

(2) In the event of non-compliance with or contravention of any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention if he proves that—

(a) as regards any matter not disclosed, he was not cognisant thereof, or

(b) the non-compliance or contravention arose from an honest mistake of fact on his part, or

(c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused

Provided that, in the event of non-compliance with or contravention of the requirements contained in clause (n) of sub-section (1) of section 93, no such director or other person shall incur any liability in respect of the non-compliance or contravention unless it be proved that he had knowledge of the matters not disclosed ) P. 53

98. **Obligations of companies where no prospectus is issued.** (1) A company which does not issue a prospectus on or with reference to its

company shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the form marked I in the Second Schedule.

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital ) P. 54

**98A. Document offering shares or debentures for sale to be deemed a prospectus.** (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof

(2) For the purposes of this Act it shall, unless the contrary is proved be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot, or

(b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus,—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign, by his agent authorised in writing P. 53



**39. Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.** A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

P. 61

**100. Liability for statements in prospectus.** (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

(a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true,

(b) With respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation Provided that the director person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it, and

(c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document  
or unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent, or

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent, or

(iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further

capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company;

(b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

P. 59

### ALLOTMENT

**101. Restriction as to allotment.** (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent. thereof has been paid to or received in cash by the company.

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely:—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company;

- (c) the repayment of any money borrowed by the company in respect of any of the foregoing matters, and
- (d) working capital.

(2A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription

(2B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103

(2C) In the event of any contravention of the provisions of sub-section (2B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees

(3) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and eighty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within one hundred and ninety days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent per annum from the expiration of the one hundred and ninetieth day. Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void

(6) This section, except sub-section (3) thereof shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

- (a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment, or

- (b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, has been subscribed and an amount not less than five per cent of the nominal amount of each share payable in cash has been paid to and received by the company.

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act

F. 85

102. Effect of irregular allotment. (1) An allotment made by a company to an applicant in contravention of the provisions of section

98 or section 101 shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 98 or section 101 with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of allotment

P. 87

**103. Restrictions on commencement of business.** (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription, and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash, and

(c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with, and

(d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be

(1) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with sub-section (2) the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees

P. 89

**105B. Issue of redeemable preference shares.** (1) Subject to the provisions of this section, a company limited by shares may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed

Provided that—

(a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company,

(b) no such shares shall be redeemed unless they are fully paid,

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company,

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are or are to be liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the

new payable under section 249 be deemed to be increased by the issue of shares in pursuance of this sub-section

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares

P. 77

105C Further issue of capital Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company

P. 79

106 Statement in balance-sheet as to commissions and discounts. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off shall be stated in every balance-sheet of the company until the whole amount thereof has been written off

#### PAYMENT OF INTEREST OUT OF CAPITAL

107. Power of company to pay interest out of capital in certain cases. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provisions of any plan which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plan

Provided that—

(1) no such payment shall be made unless the same is authorised by the articles or by special resolution,,

(2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the Central Government which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section;

(3) before sanctioning any such payment, the Central Government may, at the expense of the company, appoint a person to inquire and report to the Central Government as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry,

(4) the payment shall be made only for such period as may be determined by the Central Government, and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided,

(5) the rate of interest shall in no case exceed four per cent per annum or such lower rate as the Central Government may, by notification in the official Gazette, prescribe,

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid,

(7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate,

(8) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies

P 102

#### CERTIFICATES OF SHARES, ETC

**108. Limitation of time for issue of certificates** (1) Every company shall, within three months after the allotment of any of its shares debentures or debenture stock, and within three months after the registration of the transfer of any such shares debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P 90

#### INFORMATION AS TO MORTGAGES, CHARGES, ETC

**109. Certain mortgages and charges to be void if not registered.**

(1) Every mortgage or charge created after the commencement of this Act by a company and being either—

(a) a mortgage or charge for the purpose of securing any issue of debentures, or

(b) a mortgage or charge on uncalled share capital of the company, or

(c) a mortgage or charge, on any immovable property wherever situate, or any interest therein, or

(d) a mortgage or charge on any book debts of the company, or

(e) a mortgage or a charge, not being a pledge on any movable property of the company except stock-in-trade, or

(f) a floating charge on the undertaking or property of the company,

shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable:

Provided that—

(i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be filed with the registrar; and

(ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and

(iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and

(iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

In this section 'British India' does not include Burma or Aden, whatever the date of the mortgage or charge in question.

P. 117

#### 109A. Registration of charges on properties acquired subject to charge.

(1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed;



Provided that, if the property is situated and the charge was created outside British India twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees. P. 118

110. Particulars in case of series of debentures entitling holders *pari passu*. Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient for the purpose of section 109 if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

- (a) the total amount secured by the whole series; and
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined; and
- (c) a general description of the property charged; and
- (d) the names of the trustees (if any) for the debenture-holders: together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register;

Provided that where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debenture issued. P. 118

111. Particulars in case of commission, etc., on debentures. Where any commission, allowance or discount has been paid or made either directly or indirectly by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued:

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount. P. 119

112. Register of mortgages and charge. (1) The registrar shall keep, with respect to each company, a register in the prescribed form of all mortgages and charges created by the company after the commencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such

mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1) the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection

P. 119

113. Index to register of mortgages and charges. The registrar shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act

P. 120

114. Certificate of registration. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with

P. 120

115. Endorsement of certificate of registration on debenture or certificate of debenture stock. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created

P. 120

116. Duty of company and right of interested party as regards registration. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration

(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid

P. 120

**117. Copy of instrument creating mortgage or charge to be kept at registered office.** Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company. Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient

P. 121

**118. Registration of appointment of receiver.** (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 121

**119. Filing of accounts of receivers.** (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession shall once in every half-year while he remains in possession and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver file with the registrar notice to that effect and the registrar shall enter the notice in the register of mortgages and charges

P. 121

(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company, or the receiver of the company being a document on or in which the name of the company appears shall contain a statement that a receiver has been appointed

(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees

P. 121

**120. Rectification of register of mortgages.** (1) The Court, on being satisfied that the omission to register a mortgage or charge within the time required by section 109, or that the omission or mis-statement of any particular with respect to any such mortgage or charge, or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or share-holders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended or, as the case may be, that

the omission or mis-statement be rectified, and may make such order as to the costs of the application as it thinks fit.

(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time the mortgage or charge is actually registered

P. 120

**121. Registration or satisfaction of mortgages and charges** (1) It shall be the duty of the company to give intimation to the registrar of the payment or satisfaction of any charge or mortgage created by the company and requiring registration under section 109 within twenty-one days from the date of the payment or satisfaction thereof

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mortgagee calling upon him to show cause within a time (not exceeding fourteen days) to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be entered on the register and shall if required furnish the company with a copy thereof

(4) Where cause is shown the registrar shall record a note to that effect in the register and shall inform the company that he has done so. of the copies or register

P. 121

**122 Penalties.** (1) If any company makes default in filing with the registrar for registration the particulars—

(a) of any mortgage or charge created by the company, or

(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has been registered under section 109 or section 109A, or

(c) of the issues of debentures of a series, requiring registration with the registrar under the foregoing provisions of this Act then unless the registration has been effected on the application of some other person the company, and every officer of the company or other person who is knowingly a party to the default, shall on conviction be liable to a fine not exceeding five hundred rupees for every day during which the default continues

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the registrar of any mortgage or charge created by the company, the company, and every officer of the company, who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees

(3) If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one thousand rupees

**123. Company's register of mortgages.** (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges spe-

officially affecting property of the company and all floating charges on the undertaking or on any property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

P. 121

**124. Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.** (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies of register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

P. 121

**125. Right to inspect the register of debenture-holders and to have copies of trust deed.** (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly

authorities or permits the refusal, shall incur the like penalty, and the Court may be order compel an immediate inspection of the register. P. 121

### DEBENTURES AND FLOATING CHARGES

**126. Perpetual debentures.** A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long P. 109

**127. Power to reissue redeemed debentures in certain cases.** (1) Where either before or after the commencement of this Act a company has redeemed any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section

(3) Where a company has, either before or after the commencement of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have dis-

covered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed, or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same P. 110

**128. Specific performance of contract to subscribe for debentures.** A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance P. 110

**129. Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.** (1) Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors P. 115

#### STATEMENTS, BOOKS AND ACCOUNTS

**130. Books to be kept by company and penalty for not keeping proper books.** (1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place,

(b) all sales and purchases of goods by the company;

(c) the assets and liabilities of the company;

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-

section (3) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2)

(4) In the case of a company managed by a managing agent, the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees

P. 147

**131. Annual balance-sheet.** (1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months

Provided that the registrar may for any special reason extend the period by a period not exceeding three months

(2) The balance-sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company

(3) Every company other than a private company shall send a copy of such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report to the registered address of every member of the company at least fourteen days before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least fourteen days before that meeting

P. 147

**131A. Director's Report.** (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

(2) The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf of the directors if authorised in that behalf by the directors.



(3) The provisions of sub-section (4) of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section. F. 147

**132. Contents of balance-sheet.** (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company in accordance with the requirements indicated by the items contained in the form marked F in the Third Schedule giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near thereto as circumstances admit

(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto F. 148

**132A. Balance-sheet to include particulars as to subsidiary companies.** (1) Where a company, in this Act referred to as the holding company, holds shares, either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance-sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 133, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt in or for the purposes of the accounts of the holding company and in particular how and to what extent

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner.

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not

be deemed to be a holding company by reason only that part of its assets consist in 51 per cent or more of the shares of another company

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement

(5) The holding company may by resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours

(6) The right conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company

P. 148

**133. Authentication of Balance-sheet.** (1) Save as provided by sub-section (2) the balance-sheet and profit and loss account or income and expenditure account shall—

(i) in the case of a banking company, be signed by the manager or managing agent (if any) and, where there are more than three directors of the company, by at least three of those directors, and where there are not more than three directors, by all the directors,

(ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager or managing agent (if any) of the company

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet and profit and loss account or income and expenditure account shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case

there shall be subjoined to the balance-sheet and profit and loss account or income and expenditure account a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.

P. 149

134. Copy of balance-sheet to be forwarded to the registrar. (1) After the balance-sheet and profit and loss account or the income and expenditure account as the case may be have been laid before the company at the general meeting three copies thereof signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the copies thereof required to be filed with the registrar.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section

P. 150

135. Right of member of company to copies of the balance-sheet and the auditor's report. Save as otherwise provided in this Act, any member of a company shall be entitled to be furnished with copies of the balance-sheet and the profit and loss account or the income and expenditure account and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

#### STATEMENT TO BE PUBLISHED BY BANKING AND CERTAIN OTHER COMPANIES

136. Certain companies to publish statement in schedule. (1) Every company being a limited banking company or an insurance company or a deposit, provident or benefit society shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

(2) A copy of the statement together with a copy of the last audited balance-sheet laid before the members of the company shall be displayed

and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions

P. 150

#### INVESTIGATION BY THE REGISTRAR

137. Power of registrar to call for information or explanation. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him, and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the Central Government.

(6) If it is represented to the registrar in materials placed before him by an contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act P. 150

### INSPECTION AND AUDIT

**138. Investigation of affairs of company by inspectors.** The Central Government may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Central Government may direct—

(i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;

(ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;

(iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;

(iv) in the case of any company, on a report by the registrar under section 137, sub-section (5). P. 151

**139. Application for inspection to be supported by evidence.** An application by members of the company under section 138 shall be supported by such evidence as the Central Government may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the Central Government may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry. P. 151

**140. Inspection of books and examination of officers.** (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence. P. 151

**141. Results of examination how dealt with.** (1) On the conclusion of the investigation, the inspectors shall report their opinion to the Central Government, and a copy of the report shall be forwarded by the Central Government to the registrar and another copy to the registered office of the company, and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(2) The report shall be written or printed, as the Central Government directs.

(3) All expenses of, and incidental to, the investigation shall be defrayed by the applicants unless the Central Government directs the same to be paid by the company, which the Central Government is hereby authorised to do:

Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land-revenue.

(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody

P. 151

**141A. Institution of prosecutions.** (1) If from any report made under section 138 it appears to the Central Government that any person has been guilty of any offence in relation to the company for which he is criminally liable, the Central Government shall refer the matter to the Advocate General or the Public Prosecutor

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give

(3) For the purposes of sub-section (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.

P. 151

**142. Power of company to appoint inspectors.** (1) A company may by special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Central Government, except that, instead of reporting to the Central Government, they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or docu-

ment required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Central Government.

P. 152

143. Report of inspectors to be evidence. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

P. 152

144. Qualifications and appointment of auditors. (1) No person shall be appointed or act as an auditor of any company other than a private company not being the subsidiary company of a public company unless he holds a certificate from the Central Government entitling him to act as an auditor of companies.

Provided that a firm whereof all the partners practising in India hold such certificates may be appointed by its firm-name to be auditor of a company, and may act in its firm-name.

(2) The Central Government may, by notification in the official Gazette and after previous publication, make rules providing for the grant, renewal or cancellation of such certificate and prescribing conditions and restrictions for such grant, renewal or cancellation

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practise as a public accountant

(2A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

(a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates,

(b) prescribe the qualifications for enrolment on the Register and the fees therefor,

(c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees;

(d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register,

(e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise it on all matters of administration relating to accountancy, and to assist it in maintaining the standards of qualification and conduct of persons enrolled on the Register, and

(f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the Central Government may select, to advise it and the Indian Accountancy Board on any matter that may be referred to them.

(2B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the Central Government may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons: that is to say,

(i) a director or officer of the company; and

(ii) a partner of such director or officer; and

(iii) in the case of a company other than a private company, not being the subsidiary company of a public company any person in the employment of such director or officer; and

(iv) any person indebted to the company shall not be appointed auditors of the company and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated.

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting:

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(8) The directors may fill any casual vacancy in the office of auditors, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

P. 152

145. Powers and duties of auditors. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and



vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the accounts examined by them, and on every balance-sheet and profit and loss account laid before the company in general meeting during their tenure of office, and the report shall state:—

(a) whether or not they have obtained all the information and explanations they have required; and

(b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and

(c) whether or not such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company, and

(d) whether in their opinion books of account have been kept by the company as required by section 130

(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India

(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts

(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees

P. 153

**146. Rights of preference shareholders, etc. as to receipts and inspection of reports, etc.** (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets and profit and loss accounts of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company

(2) This section shall not apply to a private company nor to a company registered before the commencement of this Act

Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders of debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company

P. 148

### **CARRYING ON BUSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS**

147. Liability for carrying on business with fewer than seven or, in the case of a private company, two members. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member. P. 166

### **SERVICE AND AUTHENTICATION OF DOCUMENTS**

148. Service of documents on company. A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

149. Service of documents on registrar. A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

150. Authentication of documents. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

### **TABLES FORMS AND RULES AS TO PRESCRIBED MATTERS**

151. Application and alteration of tables and forms, and power to make rules as to prescribed matters. (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The Central Government may alter any of the tables and forms in the First Schedule, so that it does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule.

(3) Any alteration or addition made under sub-section (1) shall be published in the official Gazette, and on such publication the table or form as so altered or the added form, as the case may be, shall have effect as if enacted in this Act, but no alteration made by the Central Government in Table A in the First Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the Central Government may make rules providing for all or any matters which by this Act are to be prescribed by its authority.

(5) Every such rule shall be published in the official Gazette, and on such publication shall have effect as if enacted in this Act. P. 16

**ARBITRATION AND COMPROMISE**

**152. Power for companies to refer matters to arbitration.** (1) A company may by written agreement refer to arbitration, in accordance with the Indian Arbitration Act, 1940, an existing or future difference between itself and any other company or person.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body

(3) The provisions of the Indian Arbitration Act, 1940, shall apply to all arbitrations between companies and persons in pursuance of this Act. P. 158

**153. Power to compromise with creditors and members** (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company

(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company

(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

(6) In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares

into shares of different classes or by both those methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.

P. 158

**153A. Provisions for facilitating arrangements and compromises.**

(1) Where an application is made to the Court under section 153 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters —

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person,

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company,

(e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is

knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression 'property' includes property, rights and powers of every description, and the expression 'liabilities' includes duties.

(5) Notwithstanding the provisions of sub-section (6) of section 153, the expression 'company' in this section does not include any company other than a company within the meaning of this Act. P. 160

**153B. Power to acquire shares of shareholders dissenting from scheme or contract approved by majority.** (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as the 'transferee company'), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company:

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust

for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract P. 161

## CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY

154. Conversion of private company into public company. (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions of clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company, shall, as on the date of the alteration, cease to be a private company, and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seem to the Court just and expedient, order that the company be relieved from such consequences as aforesaid P. 167

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## PART V

### Winding Up

#### PRELIMINARY

155. Mode of winding up. (1) The winding up of a company may be either

- (i) by the Court, or
- (ii) voluntary; or
- (iii) subject to the supervision of the Court

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes. P. 177

**CONTRIBUTORIES**

**146. Liability as contributories of present and past members.** (1) In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say):—

(i) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member;

(iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(iv) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member,

(v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;

(vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustments of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sum unpaid on any shares held by him.

P. 196

**157. Liability of directors whose liability is unlimited.** In the winding up of a limited company any director whether past or present, whose liability is in pursuance of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company:

**Provided that—**

(i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up. **P. 195**

**158. Meaning of "contributory."** The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory. **P. 193**

**159. Nature of liability of contributory.** (1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns. **P. 194**

**160. Contributories in case of death of member.** (1) If a contributory dies either before or after he has been placed on the list of contributories, his legal representatives and his heirs shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2) If the legal representatives of heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immovable, or both, and of compelling payment thereof of the money due.

(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu law shall be deemed to be his legal representatives and heirs. **P. 195**

**161. Contributories in case of insolvency of member.** If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made. **P. 195**



## WINDING UP BY COURT

**162. Circumstances in which company may be wound up by Court.**  
A company may be wound up by the Court—

- (i) if the company has by special resolution resolved that the company be wound up by the Court;
- (ii) if default is made in filing the statutory report or in holding the statutory meeting;
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven;
- (v) if the company is unable to pay its debts;
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up

P. 177

**163. Company when deemed unable to pay its debts.** (1) A company shall be deemed to be unable to pay its debts—

(i) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing the same to be delivered by registered post or otherwise at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (1) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm.

P. 178

**164. Winding up may be referred to District Court.** Where the High Court makes an order for winding up a company under this Act, it may if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

**165. Transfer of winding up from one District Court to another.** If during the progress of a winding up in a District Court it is made to appear to the High Court that the same could be more conveniently pro-

sought in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

**166. Provisions as to applications for winding up.** An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately, or by the registrar.

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder;

(aa) the registrar shall not be entitled to present a petition for winding up a company—

(i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and

(ii) unless the previous sanction of the Central Government has been obtained to the presentation of the petition

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard

(b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held,

(c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

P. 180

**167. Effect of winding up order.** An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

P. 182

**168. Commencement of winding up by Court.** A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

P. 182

**168. Court may grant injunction.** The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit. P. 182

**170. Powers of Court on hearing the petition.** (1)\* On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it deems just, but the Court, shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.

(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver. P. 183

**171. Suits stayed on winding up order.** When a winding up order has been made or a provisional liquidator has been appointed no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose. P. 183

**171A. Vacancy in the office of liquidator.** (1) For the purposes of this Act, so far as it relates to the winding up "of" companies by the Court, the term 'official receiver' means the official receiver attached to the Court, or, if there is no such official receiver, then such person as the Central Government may, by notification in the official Gazette, appoint for the purpose.

(2) On the making of a winding up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix. P. 287

**172. Copy of winding up order to be filed with registrar.** (1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order.

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the official Gazette that such an order has been made.

(5) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued. P. 185

182. Power of Court to stay winding up. The Court may, at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit P. 183

17. Court may have regard to wishes of creditors or contributories. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence

### OFFICIAL LIQUIDATORS

175. Appointment of official liquidator. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons other than the official receiver to be called an official liquidator or official liquidators

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment. Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid

(6) A receiver shall not be appointed of assets in the hands of an official liquidator P. 207

176. Resignations, removals, filling up vacancies and compensation.

(1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court and until the vacancy is so filled up the official receiver shall be and act as the official liquidator.

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct, and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs. P. 208

177. Official liquidator. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name. P. 208

**171A. Statement of affairs to be made to the liquidator.** (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities;

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given,

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary, manager or other chief officer of the company, by such of the persons hereinafter in this sub-section mentioned as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

(a) who are or have been directors or officers of the company;

(b) who have taken part in the formation of the company at any time within one year before the relevant date;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company, which is, or within the said year was, an officer of the company to which the statement relates.

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

**(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly**

**(8) In this section the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and, in a case, where no such appointment is made, the date of the winding up order.** **P. 208**

**177B. Statement by liquidator.** (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177A, and not later than four, or with the leave of the Court, six months from the date of the order, or in the case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

(a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities giving separately under the heading of assets particulars of—

- (i) cash and negotiable securities;
- (ii) debts due from contributories,
- (iii) debts due to and securities, if any, available to the company;
- (iv) movable and immovable properties belonging to the company;
- (v) unpaid calls, and

(b) if the company has failed, as to the causes of the failure; and

(c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court **P. 209**

**178. Custody of company's property.** (1) The official liquidator whether appointed provisionally or not shall take into his custody, or under this control, all the property, effects and actionable claims to which the company is or appears to be entitled

(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company **P. 208**

**178A. Committee of inspection in compulsory winding up.** (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection

shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed.

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee; if not less than two, may act notwithstanding any vacancy in the committee. F. 210

179. Powers of official liquidator. The official liquidator shall have power, with the sanction of the Court, to do the following things:—

(a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same;

(c) to sell the immovable and moveable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(d) to do all acts and execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal;

(e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) to raise on the security of the assets of the company any money requisite;

(h) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself: Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General;

(i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets. P. 211

**180. Discretion of official liquidator.** The Court may provide by an order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order of appointing him. P. 211

**181. Provision for legal assistance to official liquidator.** The official liquidator may, with the sanction of the Court, appoint an advocate attorney or pleader entitled to appear before the Court to assist him in the performance of his duties: Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration. P. 211

**182. Liquidator to keep books containing proceedings of meetings and to submit account of his receipts to Court.** (1) The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor, or contributory may, subject to



the control of the Court, personally or by his agent inspect any such books.

(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator

(5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested

P. 212

**183. Exercise and control of liquidator's powers.** (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances

P. 212

#### ORDINARY POWERS OF COURT

**184. Settlement of list of contributories and application of assets.**

(1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of mem-

here in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

P. 183

**185. Power to require delivery of property.** The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender of transfer forthwith, or within such time as the Court directs, to the official liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

P. 183

**186. Power to order payment of debts by contributory.** (1) The Court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) The Court in making such an order may, in the case of an unlimited company, allow to the contributory by way of set-off any money due to him or to the estate which he represents from the company on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and may, in the case of a limited company, make to any director whose liability is unlimited or to his estate the like allowance:

Provided that, in the case of any company, whether limited or unlimited, when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Pp. 183, 186.

**187. Power of Court to make calls.** (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

P. 183

**188. Power to order payment into bank.** The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the account of the official liquidator in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank

of India Act, 1934, instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator. P. 182

189. Regulation of account with Court. All moneys, bills, hundis, notes and other securities paid and delivered into the Bank where the liquidator of the Company may have his account, in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court. P. 183

190. Order on contributory conclusive evidence. (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceeding whatsoever. P. 183

191. Powers to exclude creditors not proving in time. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

192. Adjustment of rights of contributories. The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto. P. 183

193. Power to order costs. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just P. 184

194. Dissolution of company. (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default P. 206

#### EXTRAORDINARY POWERS OF COURT

195. Power to summon persons suspected of having property of company. (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company

(2) The Court may examine him on oath concerning the same, \* either by word of mouth or on written interrogatories, and may reduce the answers to writing and require him to sign them

(3) The Court may require him to produce any documents in his custody or power relating to the company, but, where he claims any lien

on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sittings, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination. F. 184

**196. Power to order public examination of promoters, directors, etc.**

(1) When an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him; Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this sec-

tion as to the conduct of the examination but not as to costs, may be exercised by the person before whom the examination is held. P. 184

197. Power to arrest absconding contributory. The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such time as the Court may order P. 184

198. Saving of other sums. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any calls or other sums P. 184

#### ENFORCEMENT OF AND APPEAL FROM ORDERS

199. Power to enforce orders. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced

200. Order made in any Court to be enforced by other Courts. Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same \*

201. Mode of dealing with orders to be enforced by other Courts. Where any order made by one Court is to be enforced by another Court, a certified copy of the order so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such certified copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same

202. Appeals from orders. Re-hearings of and appeals from, any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction P. 184

#### VOLUNTARY WINDING UP

203. Circumstances in which company may be wound up voluntarily. A company may be wound up voluntarily—

(1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence

of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(2) if the company resolves by special resolution that the company be wound up voluntarily,

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up,

and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section

P. 184

204. Commencement of voluntary winding up. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntarily winding up

P. 185

205. Effect of voluntary winding up on status of company. When a company is wound up voluntarily, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up thereof

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved

206. Notice of resolution to wind up voluntarily. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the official Gazette, and also in some newspaper (if any) circulating in the district where the registered office of the company is situate

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty

P. 184

207. Declaration of solvency. (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in sub-section (1) of this section

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to

as 'a members' voluntary winding up,' and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditor's voluntary winding up.' P. 185

#### MEMBERS' VOLUNTARY WINDING UP

208. Provisions applicable to a members' voluntary winding up. The provisions contained in sections 208A to 208E, both inclusive, shall apply in relations to a members' voluntary winding up. P. 185

208A. Power of company to appoint and fix remuneration of liquidators. (1) The company in general meeting may appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof P. 185

208B. Power to fill vacancy in office of liquidator. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court P. 185

208C. Power of liquidator to accept shares, etc., as consideration for sale of property of company. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into

effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase-money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court

(6) The provisions of the Indian Arbitration Act, 1940, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section

P. 191

**208D. Duty of liquidator to call general meeting at end of each year.**

(1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees

P. 187

**208E. Final meeting and dissolution.** (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues:

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.



(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved:

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 188

#### CREDITORS' VOLUNTARY WINDING UP

209. Provisions applicable to a creditors' voluntary winding up. The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditors' voluntary winding up

P. 186

209A. Meeting of creditors. (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid, and

(b) appoint one of their number to preside at the said meeting

(4) It shall be the duty of the director appointed to preside at the meeting of the creditors to attend the meeting and preside thereat

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company

(6) If the default is made—

(a) by the company in complying with sub-sections (1) and (2);

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4),

the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty. P. 186

**209B. Appointment of liquidator.** The creditors and the company at their respective meeting mentioned in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any nominated by the company shall be liquidator:

Provided that in the case of different persons being nominated, any director member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors P. 186

**209C. Appointment of committee of inspection.** The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit appoint other persons to act as such members in place of the persons mentioned in the resolution P. 187

**209D. Fixing of liquidators' remuneration and cesser of directors' powers** (1) The committee of inspection, or if there is no such committee, the creditors, may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof. P. 187

**209E. Power to fill vacancy in office of liquidator.** If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by, or by the direction of, the Court, the creditors may fill the vacancy. P. 187

**209F. Application of section 208C to a creditors' voluntary winding up.** The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with

the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

P. 131

**209G. Duty of liquidator to call meetings of company and of creditors at the end of each year.** (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of winding up, and of each succeeding year, or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees

P. 133

**209H. Final meeting and dissolution.** (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting, the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall, in respect of that meeting, be deemed to have been complied with

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order

for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

P. 186

### MEMBERS' OR CREDITORS' VOLUNTARY WINDING UP

**210. Provisions applicable to every voluntary winding up.** The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a creditors' winding up.

P. 187

**211. Distribution of property of company.** Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

P. 187

**212. Powers and duties of liquidator in voluntary winding up.** (1) The liquidator may—

(a) in the case of a members' winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d), (e), (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers:

(b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in winding up by the Court;

(c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;

(d) exercise the power of the Court of making calls;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.

(2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves

(3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two

P. 213

**213. Power of Court to appoint and remove liquidator in voluntary winding up.** (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.

(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.

P. 187

**214. Notice by liquidator of his appointment.** (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues

P. 187

**215. Arrangement when binding on creditors.** (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

P. 190

**216. Power to apply to Court to have questions determined or powers exercised.** (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up

Such application shall be made—

(a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and

(b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind up the company

(3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just

P. 188

**217. Cost of voluntary winding up** All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims

P. 206

**218. Saving for rights of creditors and contributories.** The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up

P. 189

**219.**

**220. Power of Court to adopt proceedings of voluntary winding up.** Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

**WINDING UP SUBJECT TO SUPERVISION OF COURT**

**221. Power to order winding up subject to supervision.** When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

**P. 192**

**222. Effect of petition for winding up subject to supervision.** A petition for the continuance of a voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be petition for winding up by the Court

**P. 192**

**223. Court may have regard to wishes of creditors and contributories.** The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters, relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence

**P. 192**

**224. Power for Court to appoint or remove liquidators.** (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations and in all respects stand in the same position as if he had been appointed by the company

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal or by death or resignation

**P. 214**

**225. Effect of supervision order** (1) Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court in the same manner as if the company were being wound up altogether voluntarily

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall be for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court

**Pp 192, 214**

**226. Appointment in certain cases of voluntary liquidators to office of official liquidator.** Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for

(d) ~~compensation~~ payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company;

(e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and

(f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act.

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

P. 200

**230A. Disclaimer of property.** (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property

winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

### SUPPLEMENTAL PROVISIONS

#### **227. Avoidance of transfers, etc. after commencement of winding up.**

(1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void

**P. 197**

**228. Debts of all descriptions to be proved.** In every winding up (subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of insolvency) all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value

**P. 198**

**229. Application of insolvency rules in winding up of insolvent companies.** In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

**P. 198**

**230. Preferential payments.** (1) In a winding up there shall be paid in priority to all other debts—

(a) all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;

(b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant,

(c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date;



(d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company;

(e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company, and

(f) the expenses of any investigation held in pursuance of clause (iv) of section 138 of this Act

(2) The foregoing debts shall—

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion, and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them

(4) In the event of a landlord or other person distraining or having distrained on any good or effects of the company within three months next before the date of a winding up order the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order, and

(b) in any other case the date of the commencement of the winding up

P. 200

**230A Disclaimer of property.** (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property

(iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

**235. Power of Court to assess damages against delinquent directors, etc.** (1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible. **P. 203**

**236. Penalty for falsification of books.** If any director, manager, officer or contributory of any company being wound up destroys, mutilates, alters or falsifies or fraudulently secretes any books, paper or securities, or makes, or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine. **P. 203**

**237. Prosecution of delinquent directors.** (1) If it appears to the Court in the course of a winding up by, or subject to the supervision of the Court that any past or present director, manager or other officer, or any member, of the company has been guilty of any offence in relation to the company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer the matter to the registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the registrar and shall furnish to him such information and

give to him such access to and facilities for inspecting and taking copies of any documents, being information or documents in the possession or under the control of the liquidator relating to the matter in question, as he may require.

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the Central Government for further inquiry, and the Central Government shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the Central Government for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in the course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate-General or the public prosecutor and if advised to do so institute proceedings:

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon

(7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.

(8) If any person fails or neglects to give assistance in manner required by sub-section (7), the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.

**238. Penalty for false evidence.** If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to fine.

P. 205

**238A. Penal provisions.** (1) If any person, being a past or present director, managing agent, manager or other officer of a company which at the time of the commission of the alleged offence is being wound up, whether by or under the supervision of the Court or voluntarily, or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up—

(a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company, or

(b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up, or

(c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up; or

(d) within twelve months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company; or

(e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards; or

(f) makes any material omission in any statement relating to the affairs of the company; or

(g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof; or

(h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company; or

(i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company; or

(j) within twelve months next before the commencement of the winding up or any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company; or

(k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or

makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company, or

(l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses, or

(m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for, or

(n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for, or

(o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company, or

(p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up

he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this sub-section, with imprisonment for a term not exceeding five years, and in the case of any other offence, with imprisonment for a term not exceeding two years

Provided that it shall be a good defence to a charge under any of clauses (b) (c) (d), (l), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i) and (j), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (o) of sub-section (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years

P. 205

**239. Meetings to ascertain wishes of creditors or contributories.** (1) Where by this Act the Court is authorised in relation to winding up to have regard to wishes of creditors or contributories as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

**240. Documents of company to be evidence.** Where any company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded. **P. 206**

**241. Inspection of documents.** After an order for a winding up by or subject to the supervision of the Court, the Court may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise. **P. 206**

**242. Disposal of documents of company.** (1) When a company has been wound up and is about to be dissolved, the documents of the company and of the liquidators may be disposed of as follows (that is to say):—

(a) in the case of a winding up by or subject to the supervision of the Court, in such way as the Court directs;

(b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein. **P. 206**

**243. Power of Court to declare dissolution of company void.** (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the Company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues. **P. 206**

**244. Information as to pending liquidations.** (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, once in each year and at intervals of not more than twelve months, until the winding up is concluded, file in Court or with the registrar, as the case may be, a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be

deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.

P. 216

**244A. Payments of liquidator into bank.** (1) Every liquidator of a company which is being wound up by the Court shall, in such manner and at such times as may be prescribed, pay the money received by him into a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934:

Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent per annum and shall be liable to disallowance of all or such part of the remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.

P. 216

**244B. Unclaimed dividends and undistributed assets to be paid to Company's Liquidation Account.** (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they become payable or refundable the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled may make an order for the payment to that person of the sum due.

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single Province which are not trading corporations.

P. 217

**245. Court or person before whom affidavit may be sworn.** (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India, or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by the Central Government or the Crown Representative, or in any place outside His Majesty's dominions before any of His Majesty's Consuls or Vice-Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Con-



sul or Vice-Consul, attached appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

### RULES

**246. Power of High Court to make rules.** (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto, and for voluntary winding up (both members and creditors), for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company and generally for all applications to be made to the Court under the provisions of this Act and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

(a) holding and conducting meetings to ascertain the wishes of creditors and contributories,

(b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets;

(c) requiring delivery of property or documents to the liquidator;

(d) making calls;

(e) fixing a time within which debts and claims must be proved:

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court

### REMOVAL OF DEFUNCT COMPANIES FROM REGISTER

**247. Registrar may strike defunct company off register.** (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if answer is not received to the second letter within one month from the date thereof, a notice will be published in the official Gazette with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the official Gazette, and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the official Gazette and send to the company a like notice as is provided in the last preceding sub-section.

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register and shall publish notice thereof in the official Gazette, and, on the publication in the official Gazette, of this notice, the company shall be dissolved. Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register the Court on the application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off, and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered to the care of some director, manager or other officer of the company or if there is no director, manager or other officer of the company whose name and address are known to the registrar may be sent to each of the persons who subscribed the memorandum addressed to him at the address mentioned in the memorandum.

P. 222

## PART VI

### REGISTRATION OFFICE AND FEES

**248. Registration offices.** (1) For the purposes of the registration of companies under this Act, there shall be offices at such places as the Central Government thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The Central Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the Central Government.

(4) The Central Government may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the Central Government, not exceeding one rupee for each inspection, and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the Central Government may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall until the Central Government otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such person as the Central Government may for the time being authorise, but, in the event of the Central Government altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Central Government may appoint

**249. Fees** (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified, or such smaller fees as the Central Government may direct

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown

**249A. Enforcing submission of returns and documents to registrar**

(1) If a company, having made default in complying with any provision of this Act which requires it to file with, deliver or send to the registrar any return, account or other document, or to give notice to him of any matter fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so the Court may on an application made to the Court by any member or creditor of the company or by the registrar make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid

## PART VII

### APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS

**250. Application of Act to companies formed under former Companies Act.** In the application of this Act to existing companies, if

shall apply in the same manner in the case of a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1886, or the Indian Companies Act, 1882;

(2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

P. 15

**251. Application of Act to companies registered but not formed under former Companies Acts.** This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act.

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them

P. 15

**252. Mode of transferring.** A company registered under Act XIX of 1857 and Act VII of 1860 or either of them may cause its shares to be transferred in the manner hitherto in use, or in such other manner as the company may direct.

## PART VIII

### COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT

**253. Companies capable of being registered.** (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

(i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two, including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them.

(ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act of Parliament or Indian law other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up:

**(2) Provided as follows—**

(a) a company having the liability of its members limited by Act of Parliament or Indian law or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;

(b) a company having the liability of its members limited by Act of Parliament or Indian law or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares;

(d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose,

(e) where a company not having the liability of its members limited by Act of Parliament or Indian law or by Letters Patent is about to register as a limited company, the majority required to assent as afore-said shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;

(f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section **P. 171**

**254. Definition of "joint-stock company."** For the purposes of this Part as it relates to registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares. **P. 172**

**255. Requirements for registration by joint-stock companies.** Before the registration in pursuance of this Part of a joint-stock company, there shall be delivered to the registrar the following documents (that is to say):—

(1) a list showing the names, addresses and occupations of all persons who on a day named in the list, not being more than six clear days

before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number;

(2) a copy of any Act of Parliament, Indian law, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say):—

(a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists;

(b) the number of shares taken and the amount paid on each share;

(c) the name of the company, with the addition of the word "Limited" as the last word thereof; and

(d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

P. 172

**256. Requirements for registration by other than joint-stock companies.** Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the registrar—

(1) a list showing the names, addresses and occupations of the directors of the company, and

(2) a copy of any Act of Parliament, Indian law, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company; and

(3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

P. 173

**257. Authentication of statement of existing companies.** The list of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other principal officers of the company

P. 173

**258. Registrar may require evidence as to nature of company.** The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined.

P. 173

**259. On registration of banking company with limited liability, notice to be given to customers.** (1) Where a banking company, which was in existence on the first day of May eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address.

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have

been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation

P. 173

**260. Exemption of certain companies from payment of fees.** No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or Indian law or by Letters Patent

P. 173

**261. Addition of "Limited" to name.** When a company registers in pursuance of this Part with limited liability, the word 'Limited' shall form and be registered as part of its name

**262. Certificate of registration of existing companies.** On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited and thereupon the company shall be incorporated and shall have perpetual succession and a common seal

P. 173

**263. Vesting of property on registration.** All property, movable and immovable, including all interests and rights in to and out of property, movable and immovable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein

P. 173

**264. Saving of existing liabilities.** The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with or on behalf of the company before registration

P. 174

**265. Continuation of existing suits.** All suit and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding, but, in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company

P. 174

**266. Effect of registration under Act.** When a company is registered in pursuance of this Part—

(1) all provisions contained in any Act of Parliament, Indian law, deed of settlement, contract of co-partnery Letters Patent, or other instrument constituting or regulating the company including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company in the same manner and

with the same incidence as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles;

(ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say):—

(a) the regulations in Table A in the First Schedule shall not apply unless adopted by special resolution;

(b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered;

(c) subject to the provisions of this section the company shall not have power to alter any provision contained in any Act of Parliament or Indian law relating to the company,

(d) subject to the provisions of this section, the company shall not have power, without the sanction of the Central Government, to alter any provision contained in any Letters Patent relating to the company;

(e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the object of the company;

(f) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability; or to pay or contribute to the payment of the cost and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid; and every contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories and with reference to the assignees of insolvent contributories, shall apply;

(iii) the provisions of this Act with respect to—

(a) the registration of an unlimited company as limited;

(b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up,

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up; shall apply notwithstanding any provisions contained in any Act of Parliament, Indian law, Royal Charter, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company;



(iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act,

(v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, Indian law, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, be vested in the company

P. 174

**267. Power to substitute memorandum and articles for deed of settlement** (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its constitution by substituting a memorandum and articles for a deed of settlement

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications —

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum of articles, and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles and the Company's deed of settlement shall cease to apply to the company

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act

(4) In this section the expression 'deed of settlement' includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an Indian law a Royal Charter or Letters Patent

P. 175

**268. Power of Court to stay or restrain proceedings.** The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company

P. 175

**269. Suits stayed on winding up order** Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceedings shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court and subject to such terms as the Court may impose

P. 175

## PART IX

## WINDING UP OF UNREGISTERED COMPANIES

**270. Meaning of "unregistered company".** For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by an Indian law, nor a company registered under the Indian Companies Act, 1886, or under any Act repealed thereby, or under the Indian Companies Act, 1882, or under this Act, but save as aforesaid shall include any partnership, association or company consisting of more than seven members. P. 218

**271. Winding up of unregistered companies.** (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

(i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company,

(ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;

(iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—

(a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs,

(b) if the company is unable to pay its debts;

(c) if the Court is of opinion that it is just and equitable that the company should be wound up;

(iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor,

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal

officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same,

(c) if execution of other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act

(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British India it may be wound up as an unregistered company under the Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated

**P. 220**

**272. Contributories in winding up of unregistered companies.** (1) In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid

(2) In the event of any contributory dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply

**P. 221**

**273. Power to stay or restrain proceedings.** The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company

**P. 221**

**274. Suits stayed on winding up order.** Where an order has been made for winding up an unregistered company, no suit or other legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company except by leave of the Court, and subject to such terms as the Court may impose.

**P. 221**

**275. Directions as to property in certain cases.** If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the winding up order, or by any subsequent order, direct that all or any part of the property, movable or immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property. **P. 221**

**2776. Provisions of this Part cumulative.** The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part. **P. 222**

## PART X

### COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA

#### **277. Requirements as to companies established outside British India.**

(1) Every company incorporated outside British India, which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

(a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and if the instrument is not written in the English language, a certified translation thereof;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and managers (if any) of the company;

(d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notice required to be served on the company;

(e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company; and, in the event of any alteration being made in any such instrument or in any such address or in the directors or managers or in

the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

(1) in a case where by the law, for the time being in force of the country in which the company is incorporated such company is required to file with the public authority an annual balance-sheet,—three copies of that balance-sheet and if the balance-sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements in triplicate as shall furnish such information, or

(ii) in a case where no such provision is made by the law for the time being in force of the country in which the company is incorporated,—such a statement in triplicate in the form of a balance-sheet as such company would if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act

(4) Every company to which this section applies and which uses the word "Limited" as part of this name shall -

(a) in every prospectus inviting subscription for its shares or debentures in British India, state the country in which the company is incorporated, and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place, and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter-paper, and in all notice advertisements and other official publications of the company

(5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all bill-heads and letter-paper, notices, advertisements and other official publications of the company in British India, and to be affixed on every place where it carries on business

(6) If any company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues

(7) For the purposes of this section—

(a) the expression "certified" means certified in the prescribed manner to be a true copy or a correct translation,

(b) the expression "place of business" includes a share transfer or share registration office;

(c) the expression "director" includes any person occupying the position of director, by whatever name called; and

(d) the expression "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

(8) There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

P. 168

**277A. Restriction on sale and offer for sale of shares.** (1) It shall not be lawful for any person—

(a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established, or when formed will not establish, a place of business in British India, unless—

(i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar;

(ii) the prospectus states on the face of it that the copy has been so delivered;

(iii) the prospectus is dated, and

(iv) the prospectus otherwise complies with this Part; or

(b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part:

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debentures-holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but, subject aforesaid, this section shall apply to a prospectus form or application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 98A to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section,

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277B, the expressions 'prospectus', 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.

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**277B. Requirements as to prospectus.** (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 277A, must—

- (a) contain particulars with respect to the following matters.—
  - (i) the objects of the company;
  - (ii) the instrument constituting or defining the constitution of the company;
  - (iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected;
  - (iv) an address in British India where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected;
  - (v) the date on which and the country in which the company was incorporated;
  - (vi) whether the company has established a place of business in British India and, if so, the address of its principal office in British India.

Provided that the provisions of sub-clauses (i) (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business;

(b) subject to the provisions of this section, state the matters specified in sub-section (1A) of section 93 and set out the reports specified in that section:

Provided that—

(1) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed, and

(ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(a) as regards any matter not disclosed, he proves that he was not cognisant thereof; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused.

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of sub-section (1) of section 93, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed.

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

P. 170

**277C. Restriction on canvassing for sale of shares.** (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public

(2) In this sub-section the expression 'house' shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred

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**277D. Registration of charges.** (1) The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies (Amendment) Act, 1936, by a company incorporated outside British India which has an established place of business in British India:

Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the Company shall be deemed to be references to the principal place of business in British India of the company;

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-clause (i) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109A shall apply as if the property wherever situated were situated outside British India

(2) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1936.

Provided that where the provisions of section 109 and section 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1936.

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**277E. Notice of appointment of receiver.** The provisions of sections 118 and 119 shall *mutatis mutandis* apply to the case of all companies



incorporated outside British India but having an established place of business in British India and the provisions of section 130 shall apply to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India.

Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.

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## PART XI

### SUPPLEMENTAL

#### LEGAL PROCEEDINGS, OFFENCES, ETC

**274. Cognizance of offences.** (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held

(3) Notwithstanding anything in the Code of Criminal Procedure 1898, every offence against this Act shall, for the purposes of the said Code, be deemed to be non-cognizable

**279. Application of fines.** The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered

**280. Power to require limited company to give security for costs.** Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given

**281. Power of Court to grant relief in certain cases.** (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following:—

(a) directors of a company;

(b) managers and managing agents of a company;

(c) officers of a company;

(d) persons employed by a company as auditors, whether they are or are not officers of the company

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**282. Penalty for false statement.** Whoever in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine

**282A. Penalty for wrongful withholding of property.** Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.

**282B. Penalty for misapplication of securities by employers.** (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the commencement of the Indian Companies (Amendment) Act, 1936, shall be either deposited in a Post Office Savings Bank Account or invested in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the said Act which are not so deposited or invested shall be so deposited or invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys;

Provided that where one-tenth part of the whole amount of the moneys belonging to such fund exceeds the maximum amount which may be deposited in a Post Office Savings Bank Account under the rules regulating such deposits for the time being in force, the amount of such excess may be kept or deposited in a special account to be opened for the purpose in a scheduled bank as defined in clause (c) of section 2 of the Reserve Bank of India Act, 1934 (II of 1934)

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment

(4) An employee shall be entitled on request made in this behalf to the company to see the bank's receipt for any money or security such as is referred to in sub-section (1) and sub-section (2)

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees

(6) Nothing in sub-section (2) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund where the fund is a recognised provident fund within the meaning of clause (a) of section 58A of the Indian Income-Tax Act, 1922 (XI of 1922) or the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8 and 9 of the Indian Income-Tax (Provident Funds Relief) Rules

**283. Penalty for improper use of word "Limited."** If any person or persons trade or carry on business under any name or title of which 'Limited' is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used

**284. Saving of pending proceedings for winding up.** The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act 1936, had not been passed **P. 16**

**285. Saving of document.** Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force

**286. Former registration offices and registers continued.** (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

**287. Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.** Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912, or of the Provident Insurance Societies Act, 1912. P. 15

**288. Construction of "registrar of joint-stock companies" in Act XXI of 1860.** In sections 1 and 18 of Act No. XXI of 1860 (for the registration of Literary, Scientific and Charitable Societies), the words "registrar of joint-stock companies" shall be construed to mean the registrar under this Act.

**289. Act not to apply to Banks of Bengal, Madras or Bombay.** Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay. P. 15

**289A. Application of Act to non-trading companies with purely Provincial objects.** The powers conferred by this Act on the Central Government shall, in relation to companies with objects confined to a single Province which are not trading corporations, be powers of the Provincial Government. P. 16

**290. Repeal of Acts and Savings.** (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof

Provided that the repeal shall not affect—

(a) the incorporation of any company registered under any enactment hereby repealed, nor

(b) Table B in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act, nor

(c) Table A in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act 1897, with regard to the effect of repeals.

TABLE A  
SCHEDULES

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THE FIRST SCHEDULE

(*See sections 2, 17, 18, 79, 226*)

TABLE A

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES

PRELIMINARY

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*; and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate

BUSINESS

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

SHARES

3 Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company is liable to be redeemed.

4 If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may subject to the provisions of section 66A of the Indian Companies Act, 1913 be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meeting shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one third of the issued shares of the class

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five cent of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon: Provided that, in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

7. If a share certificate is defaced lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

8. Except to the extent allowed by section 54A of the Indian Companies Act, 1913, no part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares

#### LIEN

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

10. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase-money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

#### CALLS ON SHARES

12. The directors may from time to time make calls upon the members in respect of the moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled or unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent) as may be agreed upon between the member paying the sum in advance and the directors.

#### TRANSFER AND TRANSMISSION OF SHARES

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve

I, A B of \_\_\_\_\_, in consideration of the sum of rupees \_\_\_\_\_ paid to me by C. D. of \_\_\_\_\_ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share (or shares) numbered in the undertaking called the \_\_\_\_\_ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid. As witness our hands the \_\_\_\_\_ day of \_\_\_\_\_

Witness to the signatures of, etc.

20. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to the company in respect thereof; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

#### FORFEITURE OF SHARES

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

25. The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.



28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share becomes payable at a fixed time whether on account of the amount of the share, or by way of premium as if the same had been payable by virtue of a call duly made and notified

#### CONVERSION OF SHARES INTO STOCK

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination

32. The holders of stock may transfer the same, or any part thereof in the same manner, and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit, but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose

33. The holders of stock shall, according to the amount of the stock held by them have the same rights, privileges and advantages as regards dividends, voting at meetings of company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares have conferred that privilege or advantage

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder"

#### SHARE-WARRANTS

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully

paid-up, on application in writing signed by the person registered as holder of share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it and the shares shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share-warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members as the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may from time to time make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

#### ALTERATION OF CAPITAL

41. The directors may, with the sanction of the company in general meeting, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by

notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

44 The company may, by ordinary resolution—

(a) consolidate and divide its share capital into shares of larger amount than its existing shares;

(b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913;

(c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person;

44-A The company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.

#### GENERAL MEETINGS

45 The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46 A general meeting shall be held within eighteen months from the date of its incorporation and thereafter once at least in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting, being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

47. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionists as provided by section 78 of the Indian Companies Act, 1913. If at any time there are not within British India sufficient directors capable of

acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

#### PROCEEDINGS AT GENERAL MEETING

49. Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions, fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the Indian Companies Act, 1913, or the regulations of the company, entitled to receive such notices from the company; but the accidental omission to give notice to or the non-receipt of notice by any member shall not invalidate the proceedings at any general meeting.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, two members in the case of a private company and five members in the case of any other company personally present shall be a quorum

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the

declaration of the result of the show of hands) demanded in accordance with the provisions of clause (c) of sub-section (1) of section 79 of the Indian Companies Act, 1913, and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands been carried, or carried unanimously, or by a particular majority or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against that resolution

57 If a poll is duly demanded it shall be taken in such manner as the chairman directs and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded

58 In the case of an equality of votes whether on a show of hands or on a poll the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded shall be entitled to a second or casting vote

59 A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs

#### VOTES OF MEMBERS

60 On a show of hands every member present in person shall have one vote On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him

61 In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders and for this purpose seniority shall be determined by the order in which the names stand in the register of members

62 A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote whether on show of hands or on a poll by his committee or other legal guardian, and any such committee or guardian may on a poll vote by proxy

63 No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid

64 On a poll votes may be given either personally or by proxy Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act 1913 is in force

65 The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation either under the common seal or under the hand of an officer or attorney so authorised No person shall act as a proxy unless he is a member of the company

66 The instrument appointing a proxy and the power-of-attorney or other authority (if any) under which it is signed or a notarially certified copy of that power or authority, shall be deposited at the registered office

of the company not less than seventy-two hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

67. An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:

"I, \_\_\_\_\_ of \_\_\_\_\_ Company, Limited, in the district of \_\_\_\_\_ being  
 a member of the \_\_\_\_\_ Company, Limited, hereby appoint \_\_\_\_\_  
 of \_\_\_\_\_ as my proxy to vote for me and on my  
 behalf at the (ordinary or extraordinary, as the case may be) general  
 meeting of the company to be held on the \_\_\_\_\_ day of \_\_\_\_\_ and  
 at any adjournment thereof "

Signed this                      day of

## DIRECTORS

68. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association

69. The remuneration of the directors shall from time to time be determined by the company in general meeting

70. The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of section 85 of the Indian Companies Act, 1913

## POWERS AND DUTIES OF DIRECTORS

71. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

73 The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time

exceed the issued share capital of the company without the sanction of the company in general meeting

74 The directors shall duly comply with the provisions of the Indian Companies Act 1913 or any statutory modification thereof for the time being in force and in particular with the provisions in regard to the registration of the particulars of mortgages and charges affecting the property of the company or created by it, and to keeping a register of the directors and to sending to the registrar an annual list of members and a summary of particulars relating thereto and notice of any consolidation or increase of share capital or conversion of shares into stock and copies of special resolution, and a copy of the register of directors and notifications of any changes therein

75 The director shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors
  - (b) of the names of the directors present at each meeting of the directors and of any committee of the directors
  - (c) of all resolutions and proceedings at all meetings of the company and of the directors and of committees of directors
- and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose

#### THE SEAL

76 The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose and those two directors and secretary or other person is aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence

#### DISQUALIFICATIONS OF DIRECTORS

77 The office of director shall be vacated if the director

- (a) fails to obtain within the time specified in sub-section (1) of section 85 of the Indian Companies Act 1913 or at any time thereafter ceases to hold the share qualifications if any necessary for his appointment or
- (b) is found to be of unsound mind by a Court of competent jurisdiction or
- (c) is adjudged insolvent or
- (d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made or
- (e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or
- (f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is longer without leave of absence from the board of directors or
- (g) accepts a loan from company or

(h) is concerned or participates in the profits of any contract with the company; or

(i) is punished with imprisonment for a term exceeding six months:

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

#### ROTATION OF DIRECTORS

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

80. A retiring director shall be eligible for re-election

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

83. Subject to the provisions of section 83A and 83B of the Indian Companies Act, 1913 the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.



### PROCEEDINGS OF DIRECTORS

87 The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may and the secretary on the requisition of a director shall, at any time summon a meeting of directors.

88 The quorum necessary for the transaction of the business of the directors may be fixed by the directors and unless so fixed shall (when the number of directors exceeds three) be three.

89 The continuing directors may act notwithstanding any vacancy in their body but if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company but for no other purpose.

90 The directors may elect a chairman of their meetings and determine the period for which he is to hold office but if no such chairman is elected or if at any meeting the Chairman is not present within five minutes after the time appointed for holding the same the directors present may choose one of their number to be chairman of the meeting.

91 The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit, any committee so formed shall in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

92 A committee may elect a chairman of their meetings if no such chairman is elected or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same the members present may choose one of the number to be chairman of the meeting.

93 A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present and in case of an equality of votes the chairman shall have a second or casting vote.

94 All acts done by an meeting of the directors or of a committee of directors or by any person acting as a director shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a director.

### DIVIDENDS AND RESERVE

95 The company in general meeting may declare dividends but no dividends shall exceed the amount recommended by the directors.

96 The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

97. No dividends shall be paid otherwise than out of profits of the year or any other undistributed profits.

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

101. Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company

#### ACCOUNTS

103. The directors shall cause to be kept proper books of account with respect to—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place,
- (b) all sales and purchases of goods by the company,
- (c) the assets and liabilities of the company

104. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

106. The directors shall as required by sections 131 and 131A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts, income and expenditure accounts, balance-sheets and reports as are referred to in those sections.

107. The profit and loss account shall in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act, 1913, show, arranged under the most convenient heads, the amount of gross income (diminished in the case of a banking company by the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts), distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, fourteen days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

#### AUDIT

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

#### NOTICES

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notice to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive, notice of the meeting.

### TABLE B

(See sections 249 and 262.)

#### TABLE OF FEES TO BE PAID TO THE REGISTRAR

##### 1.—BY A COMPANY HAVING A SHARE CAPITAL

	Rs. a. p.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40 0 0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,000 rupees	1 0 0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share capital had formed part of the original share capital at the time of registration:	

## I.—BY A COMPANY HAVING A SHARE CAPITAL—contd.

Rs a p

Provided that no company shall be liable to pay in respect of nominal share capital on registration or afterwards, any greater amount of fees than 1,000 rupees taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration

4. For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up 5 0 0
6. For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of 5 0 0

## II.—BY A COMPANY NOT HAVING A SHARE CAPITAL

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 40 0 0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 .. 100 0 0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of 400 0 0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable in respect of such increase if such increase had been stated in the articles of association at the time of registration:

Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the Company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract

	Rs. a p.
required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up	5 0 0
8 For making a record of any fact by this Act authorised or required to be recorded by the registrar, a fee of	5 0 0

## THE SECOND SCHEDULE

(See section 98 and 151.)

### FORM I

THE INDIAN COMPANIES ACT, 1913

### STATEMENT IN LIEU OF PROSPECTUS

filed by

Pursuant to section 98 of the Indian Companies Act 1913 Presented for filing by

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the nominal share capital of the Company	Rs	
Divided into	Shares of Rs	each
	Shares of Rs	each
	Shares of Rs	each
Amount (if any) of above capital which consists of redeemable preference shares	Shares of Rs	each
The date on or before which these shares are, or are liable, to be redeemed		
Names, descriptions, and addresses of directors or proposed directors and managers or proposed managers and any provision in the articles, or in any contract, as to appointment of and remuneration payable to directors or managers		
If the share capital of the company is divided into different classes of shares the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively		
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash	1 — shares of Rs	
	fully paid	
	2 — shares upon which	
	Rs per share credited as paid	
	3 Debentures Rs..	
	4 Consideration	

Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company

Amount (in cash, shares or debentures) payable to each separate vendor

Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill	Total purchase price Rs
	Cash Rs
	Shares Rs
	Debentures Rs
	Goodwill Rs

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or	Amount paid
	Amount payable

Rate of the commission	Rate per cent
------------------------	---------------

The number of shares if any, which persons have agreed for a commission to subscribe absolutely

Estimated amount of preliminary expenses	Rs
--	----

Amount paid or intended to be paid to any promoter	Name of promoter
	Amount Rs

Consideration for the payment	Consideration
-------------------------------	---------------

Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts other than contracts appointing or fixing the remuneration of a managing director or managing agent entered into more than two years before the delivery of this statement)

Time and place at which the contracts or copies thereof may be inspected

Names and addresses of the auditors of the company (if any)

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become or to qualify him as, director, or otherwise, for services rendered by him or by the firm in connection with the promotion or formation of the company

If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on

(Signature of the persons above-named as Directors or proposed Directors or of their agents authorised in writing)

## FORM II

THE INDIAN COMPANIES ACT, 1913

### STATEMENT IN LIEU OF PROSPECTUS

filed by

... LIMITED

Pursuant to sub-section (1) of section 154 of the Indian Companies Act, 1913, Presented for filing by

The nominal share capital of the company | Rs

Divided into

Shares of Rs	each
Shares of Rs	each
Shares of Rs	each

Amount (if any) of above capital which consists of redeemable preference shares

Shares of Rs	each
--------------	------

The date on or before which these shares are, or are liable, to be redeemed

Names, descriptions and addresses of directors or proposed directors and managers or proposed managers, and any provision in the articles, or in any contract, as to appointment of and remuneration payable to directors or managers.



If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.

Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement

- 1 shares of Rs fully paid
- 2 shares upon which Rs per share credited as paid
- 3 Debentures Rs
- 4 Consideration

Names and addresses of vendors of property (1) purchased or acquired by the company within the two years preceding the date of this statement or (2) agreed or proposed to be purchased or acquired by the company.

Amount (in cash, shares or debentures) payable to each separate vendor.

Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.

Total purchase price Rs  
Cash Rs  
Shares Rs  
Debentures Rs  
Goodwill Rs

Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company; or

Amount paid  
Amount payable

Rate of the commission

Rate per cent

The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.

Unless more than two years have elapsed since the date on which the company was entitled to commence business —

Estimated amount of preliminary expenses Rs

Amount paid or intended to be paid to any promoter.

Name of promoter  
Amount Rs

Consideration for the payment.

Consideration

Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement)

Time and place at which the contracts or copies thereof may be inspected

Names and addresses of the auditors of the company (if any)

Full particulars of the nature and extent of the interest of every director in the promotion of or in the property purchased or acquired by the company within the two years preceding the date of this statement or proposed to be acquired by the company or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as a director or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company

If it is proposed to acquire any business the amount, as certified by the persons by whom the accounts of the business have been audited of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if reference to two years or one year as the case may be, were substituted for references to three years and in any such case the statement shall say how long the business to be acquired has been carried on

(Signatures of the persons above-named as Directors or proposed Directors or of their agents authorised in writing)

Dated the

day of

19

# THE THIRD SCHEDULE

## FORM A

(See sections 6 and 151.)

### MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES

1st.—The name of the Company is "The Eastern Steam Packet Company, Limited."

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the conveyance of passengers, and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees, divided into one thousand shares of two hundred rupees each

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.					Number of shares taken by each subscriber.
1.	A. B.	of	merchant	.. .. .	200
2.	C. D.	"	"	.. .. .	25
3.	E. F.	"	"	.. .. .	30
4.	G. H.	"	"	.. .. .	40
5.	I. J.	"	"	.. .. .	15
6.	K. L.	"	"	.. .. .	5
7.	M. N.	"	"	.. .. .	10
Total shares taken					325

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_

Witness to the above signatures.

X. Y., of \_\_\_\_\_

## FORM E

AS REQUIRED BY PART II OF THE ACT

(See section 32.)

Summary of Share Capital and Shares of the \_\_\_\_\_ Company  
Limited, made up to the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_ (being the  
day of the first ordinary general meeting in 19\_\_ ).

Nominal share capital Rs.	divided into*	} shares of Rs. shares of Rs.	each. each.
Total number of shares taken up* to the day of 19 which number must agree with the total shown in the list as held by existing members			
Number of shares issued subject to payment wholly in cash			
Number of shares issued as fully paid up otherwise than in cash			
Number of shares issued as partly paid up to the extent of per share otherwise than in cash			
There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
There has been called up on each—of shares			Rs.
†Total amount of calls received including payments on application and allotment			Rs
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash			Rs
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of per share			Rs
Total amount of calls unpaid			Rs
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary			Rs
Total amount of shares and stock for which share-warrants are issued respectively since date of last summary			Rs
Total amount (if any) paid on shares forfeited			Rs
Total amount of shares and stock for which share-warrants are outstanding			Rs
Total amount of share-warrants issued and surrendered respectively since date of last summary			Rs
Number of shares or amount of stock comprised in each share-warrant			Rs
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act			Rs.

List of Persons holding shares in the \_\_\_\_\_ Company, Limited,  
on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and of persons who have held  
shares therein at any time since the date of the last return, showing their  
names and addresses and an account of the shares so held.

\*When there are shares of different kinds or amounts (e.g. Preference and Ordinary of Rs 200 or Rs 100) state the numbers and nominal values separately.

†Where various amounts have been called or there are shares of different kinds, state them separately

‡Include what has been received on forfeited as well as on existing shares.

§State the aggregate number of shares forfeited.



Names and addresses of the persons who are the Directors of the  
 , Limited, on the day of 19

Names	Addresses
— — — — —	— — — — —

Names and addresses of the persons who are the Managers of the  
 Limited on the day of 19

Names	Addresses
—	

*Note*—Banking Companies must add a list of all their places of business

I, do hereby certify that the above list and  
 summary truly and correctly states the facts as they stood on  
 day of 19 .

(Signature)

(State whether director manager or secretary)

# FORM F.

(See section 112)

LIMITED

Balance Sheet as at

19

CAPITAL AND LIABILITIES	ASSETS
<p><b>Capital</b></p> <p>Authorized Capital (Distinguishing between the various classes of Capital)</p> <p>Issued Capital (1) Shares issued as fully paid up pursuant to a contract of Rs. without payments being received in cash</p> <p>(2) Shares issued for payment in cash</p> <p>Subscribed Capital</p> <p>Amount called up at Rs. per share</p> <p>Less—Calls unpaid</p> <p>(1) due from Managing Agents</p> <p>(2) due from others</p> <p>Add—Forfeited shares (amount paid up)</p> <p>Not—Where circumstances permit issued and subscribed capital and amount called up may be shown as in them e.g.</p> <p>Issued and Subscribed Capital</p> <p>paid up</p> <p><b>Reserves</b></p> <p>Debentures showing the nature of security</p> <p>Any Sinking Fund</p> <p>Any Other Fund Created out of Net Profits in liquidation and development fund</p> <p>Any Pension or Insurance Fund</p> <p>Provision for Bad and Doubtful Debts*</p>	<p><b>PROPERTY AND ASSETS</b></p> <p><b>FIXED CAPITAL EXPENDITURE—</b> (Distinguishing as far as possible between expenditure upon goodwill, land, buildings, leaseholds, railway siding, plant, machinery, furniture, development of property, patents, trade marks and designs, interest paid out of capital during construction etc. and stating in every case the original cost and the additions thereto and deductions therefrom during the year and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance sheet after the first balance sheet subsequent to the reduction or revaluation shall show the reduced figures with the date, and the amount of the reduction made)</p> <p><b>PRELIMINARY EXPENSES</b></p> <p>(Commission or Brokerage paid for underwriting and placing of subscription or Brokerage paid for underwriting and placing of subscription shares or debentures until written off)</p> <p>Discount Allowed on the issue of shares or so much as has not been written off at the date of the balance sheet</p> <p>STOCKS AND SHARE POSSESSIONS</p> <p>LOANS</p> <p>DEBT STOCK AND DEBT</p> <p>STOCKS IN HAND</p> <p>(Setting in order of valuation e.g. cost or market value)</p> <p><b>DEBTS OR ENGAGEMENTS</b></p>

\* The Form was substituted by S. 124 of the Indian Companies (Amendment) Act 1936 (XXII of 1936)

\* (in the case of Companies other than Banking Companies)

CAPITAL AND LIABILITIES—Contd.	PROPERTY AND ASSETS—Contd.
<p>(a) Secured—</p> <p>(i) loans on mortgages or fixed assets</p> <p>(ii) loans on debentures</p> <p>(iii) loans from banks stating the nature of title</p> <p>(iv) liabilities to subsidiary companies</p> <p>(v) other secured loans stating the nature of security</p> <p>(vi) interest accrued on mortgage debentures on other secured loans</p>	<p>BOOK DEBTS—</p> <p>(Other than bad and doubtful debts of a Banking company for which provision has been made to the satisfaction of the auditors)</p> <p>(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security and distinguishing between debts considered good and debts considered doubtful or bad—Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated)</p>
<p>(b) Unsecured—</p> <p>(i) loans from banks</p> <p>(ii) fixed deposits</p> <p>(iii) short term loans</p> <p>(iv) advances by directors, managers, and in agents</p> <p>(v) interest accruing but not due at the statement date</p> <p>(vi) liabilities to subsidiary companies</p>	<p>ADVANCES—</p> <p>Recoverable in cash or in kind or for value to be received e.g. Rates, Taxes, Insurance, etc. (showing separately)—</p> <p>(i) Loans given to subsidiary companies</p> <p>(ii) Loans including temporary advances made at any time during the year to directors or managers of the company</p>
<p>UNCLAIMED DIVIDENDS—</p> <p>For Goods supplied</p> <p>For Expenses</p> <p>For Acceptance</p> <p>For Other Finance</p>	<p>INVESTMENTS—</p> <p>(Showing nature of investments and mode of valuation e.g. cost or Market Value and distinguishing)</p> <p>(i) Investments in Government or trust securities</p> <p>(ii) Investments in shares, debentures or bonds (showing separately shares fully paid up and partly paid up)</p> <p>(iii) Investments in shares, debentures, bonds of various companies</p> <p>(iv) Immovable property</p>
<p>ADVANCE PAYMENTS AND UNPAID DISCOUNTS—</p> <p>(For the portion for which value has still to be given e.g. in the case of the following classes of companies—News paper, Fire Insurance, Theatre Club, Banking, Steamship Companies, etc.)</p>	<p>INTEREST ACCRUED ON INVESTMENTS</p>
<p>Profit and Loss</p>	<p>CASH AND CREDIT BALANCES—</p> <p>Amount in hand</p> <p>Balances with Agents and Bankers (in detail showing whether on deposit or current account, etc.)</p>
<p>CONTINGENT LIABILITIES—</p> <p>Claims against the company not acknowledged by rights</p> <p>Monies for which the company is contingently liable (showing separately the amount of any guarantees given by the company on behalf of directors or officers of the company)</p> <p>Arrears of Cumulative Preference Dividends</p>	<p>PROFIT AND LOSS</p>

The information required to be given under any of the items or sub-items in this Form if not included in the Balance Sheet itself shall be furnished in a separate Schedule or Schedules to be attached to and to form part of the Balance Sheet



## FORM G

(See section 136)

**FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND  
INSURANCE COMPANIES AND DEPOSIT PROVIDENT OR  
BENEFIT SOCIETIES**

\*The share capital of the company is Rs                      divided into                      shares  
of Rs                      each

The number of shares issued is                      Calls to the amount of  
Rs                      per share have been made under which the sum  
of Rs                      has been received

The liabilities of the company on the thirty-first day of December (or  
thirtieth of June) were—

Debts owing to sundry persons by the company

Under decree Rs

On mortgages or bonds Rs

On notes bills or hundis Rs

On other contracts Rs

On estimated liabilities Rs

The assets of the company on that day were

Government securities (stating them) Rs

Bills of exchange hundis and promissory notes Rs

Cash at the Bankers Rs

Other securities Rs

## FORM H

(See section 27c)

**INFORMATION TO BE SUPPLIED IN OR IN ADDITION TO THE  
INFORMATION CONTAINED IN THE BALANCE-SHEET OF A  
COMPANY REFERRED TO IN PART X**

**Liabilities**

- 1 Summary of Authorised Share Capital and Issued Share Capital
- 2 Redeemable Preference Shares stating date on or before which the  
shares are or are liable to be redeemed
- 3 Debentures stating the nature of the security
- 4 Redeemed debentures which the Company has power to re-issue
- 5 Loans (a) secured stating the nature of the security (b) unsecured
- 6 Loans from Banks —  
    (a) Secured, stating the nature of the security  
    (b) Unsecured
- 7 Profit and Loss Account showing (unless disclosed in a separate  
account) —  
    Balance as per previous Balance-Sheet  
    Appropriation thereof  
    Profit since last Balance-Sheet
- 8 Contingent Liabilities
- 9 Arrears of Cumulative Preference Dividend

\*If the company has no capital divided into shares the portion of the  
statement relating to capital and shares must be omitted

**Assets**

1 Fixed Assets with sufficient particulars to disclose their general nature, and stating how their values are arrived at

2 Preliminary expenses, so far as not written off

3 Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off

4 If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained

5 Interest paid on Capital so far as not written off showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate

6 Discount allowed on shares issued, so far as not written off

7 Commission paid or allowed in respect of any shares or debentures so far as not written off

8 Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company

9 Particulars showing —

(a) the amount of any loans which during the period to which the accounts relate have been made either by the Company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period, and

(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof and

(c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees percentages or other emoluments paid to or receivable by them by or from the Company or by or from any subsidiary Company

**NOTE (1)** There shall not be required to be shown —

(a) in the case of a Company the ordinary business of which includes the lending of money loans made by the Company in the ordinary course of its business or

(b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees

**NOTE (2)** — The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees

(Where a company is a holding company then the Balance-Sheet shall disclose the particulars required by section 132A)

## APPENDIX A

### Documents and Notices required to be registered or filed with the Registrar of Companies.

Section	Documents
15 (1)	Copy or order of Court confirming alteration in company's objects together with copy of memorandum altered.
15 (2)	Copy of order of Court confirming change of registered office from one province to another.
22	Memorandum and articles on registration of a new company.
24 (2)	Declaration by advocate, etc., of compliance with requirements of Act as to registration.
32 (3)	Annual List of Members and Summary together with a certificate about their correctness
32 (4)	Private company to send with the Annual List and Summary a certificate signed by a director or other officer that the company has not issued during the period of the return any invitation to the public to subscribe for its shares or debentures.
39	Notice of rectification of Register of Members.
41 (2)	Notice of situation of office where branch register of members kept, and of any change therein.
50 (4)	Notice of exercise of power to sub-divide or cancel shares
51 (1)	Notice of consolidation of share capital, conversion of shares into stock, etc.
53 (1)	Notice of increase of share capital or of members.
61 (1)	Order and Minute of reduction of share capital
66A (5)	Copy of order regarding variation of shareholders' rights.
72 (2)	Notice of situation of registered office, and of any change therein.
77 (5)	Statutory Report (a private company need not file the same).
82 (1)	Copies of special and extraordinary resolutions.
84 (1)	Consent in writing to act as a director, and contract to take and pay for qualification shares or an affidavit stating that such shares already stand in his name (a director of a private company need not file these).
84 (2)	List of persons consenting to be directors of the company (a private company need not file the same).
87 (2)	Return in prescribed form containing the particulars specified in the register containing names and addresses of directors, managers and managing agents and of any change therein.
92 (2)	Copy of prospectus.
98 (1)	Statement in lieu of prospectus.
103 (3)	Verified declaration by secretary, etc., of compliance with conditions for a company to commence business
104 (1)(a)	Return as to allotment of shares.
104 (1)(b) and (2)	Verified copy of contract or prescribed particulars relating to shares allotted as paid up otherwise than in cash with the return as to allotment.
105 (1)(b)	Statement disclosing amount or rate of underwriting commission where shares are not offered to the public.
109 (1). 106	Particulars of mortgage or charge together with instrument by which the mortgage or charge is created or a verified copy thereof.

## Section

## Documents

- 109A (1) Prescribed particulars of charge and certified copy of instrument creating charge where property is acquired by company as being subject to a charge requiring registration under the Act.
- 110, 116 Particulars in case of series of debentures entitling holders *pari passu*.
- 111 Particulars in case of commission, etc., on debentures.
- 116 (2) Particulars of modification of terms, etc., of charge.
- 118 (1) Notice of appointment of Receiver.
- 119 (1) Accounts of Receiver and notice on ceasing to act as Receiver.
- 121 (1) Information about payment or satisfaction of charge.
- 184 (1) & (2) Copy of Balance-sheet (a private company need not file it.)
- 153 (3) Copy of order sanctioning compromise.
- 153A (3) Certified copy of order sanctioning a scheme of reconstruction or amalgamation.
- 154 (3) Prospectus or a statement in lieu of prospectus on conversion of private into public company.
- 172 (1) Copy of order of Court winding up the Company.
- 194 (2) Order of Court dissolving a company.
- 208E (3) Return of holding of final meeting or meetings and copy of account in voluntary winding up.
- 209H (3)
- 208E (5) Copy of order deferring date of dissolution.
- 209H (5)
- 214 (1) Notice by liquidator in voluntary winding up of his appointment.
- 243 (2) Copy of Court's order declaring dissolution of company void.
- 244 (1) Information in prescribed form as to pending liquidation by liquidator in voluntary winding up, and a copy of such information by official liquidator.
- 255 Documents relating to registration of Joint Stock Companies under Part VIII.
- 256 Documents relating to registration of other companies under Part VIII.
- 277 (1) Documents relating to foreign companies.
- 277 (1) Declaration by a banking company verified by affidavit as to receipt of minimum amount on share allotted.

## APPENDIX B

**Registers, Books, etc., required to be maintained in the Company's Office  
under the Act.**

Section	Documents
91 (1)	Register of Members open to public inspection The Annual List of members and Summary under s 32 are to be contained in a separate part of the Register of Members
31A	Index of members where their number is more than fifty
41, 42	British Register of Members
83 (1)	Minutes of proceedings of general meetings and of directors' meetings.
87 (1)	Register of names and addresses of directors, managers and managing agents open to public inspection
91A (3)	Register for entering particulars of contracts in which a director is directly or indirectly interested
91C (1)	Contract appointing manager or managing agent in which a director is interested
91D	Memorandum in respect of contract by agents in which company is undisclosed principal
117	Copies of instruments creating mortgages or charges open to inspection of members and creditors
123 (1)	Register of mortgages and charges open to public inspection.
125 (1)	Register of debenture holders
130 (2)	Books of account open to inspection of directors
131 (8)	Copy of audited balance-sheet and profit and loss account to be deposited at company's registered office for inspection of members.
136 (2)	Half-yearly statement to be published by banking companies, etc., and to be displayed in company's registered office and in every branch office

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